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LAW OF INTESTATE SUCCESSION IN
SCOTLAND.

LAW OF
INTESTATE SUCCESSION
IN SCOTLAND

WITH

COMPARATIVE TABLES SHOWING DIVISION OF
MOVEABLES IN SCOTLAND AND IN ENGLAND

AND

NOTES ON DIVISION OF INTESTATE ESTATES
IN THE DOMINIONS

BY

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EDINBURGH AND GLASGOW

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PREFACE.

THE Law of Intestate Succession in force at the present time is for the most part the common law as set forth in the Institutional writers. Like most branches of the common law it has not remained entirely untouched by statute. The order of succession itself has been modified in part by the Intestate Moveable Succession Acts of 1855 and 1919, and by the Conveyancing Act of 1874; and the Intestate Husband's Estate Acts of 1911 and 1919 have given the widow a new right preferable to certain lines of heirs. In other respects also the law of succession generally—and incidentally the law of intestate succession—has been modified by various statutes ending with the Conveyancing Act of 1924. Perhaps in no other department of the law has judicial interpretation lagged longer behind legislative enactment—a circumstance which, while containing an implied tribute to the spirit of compromise inherent in the traditions of the family lawyer, has, in some respects, been adverse to clarity in this important branch of law. The following pages contain a restatement of the Law of Intestate Succession in Scotland, illustrated by tables, in a form which may prove of interest generally as well as of service to the practitioner.

Nowadays, to a greater degree than formerly, it is necessary to take cognisance of the rules of Intestate Succession which are operative in neighbouring territories. Some reference has therefore been made in the Appendices to the Laws of England and of the British Dominions.

I take this opportunity of acknowledging the useful suggestions of my friends, Mr. John Cameron, LL.B., Glasgow, and Mr. J. J. Craik Henderson, B.L., Glasgow, who kindly read the proof sheets.

J. W.

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CHAPTER I.

SUCCESSION GENERALLY.

HEIR AND EXECUTOR, s. 2.

OPENING OF SUCCESSION, s. 12.

INTESTACY, s. 8.

RIGHT TO SUCCEED, s. 16.

1. Succession is described by Lord Stair as the most important title in law, because by succession the rights of all persons necessarily pass once, and frequently oftener, in every generation.¹ Succession has also been defined as the right of an heir or executor to enter upon the estate which belonged to a person deceased at the time of his death.² It may be said to involve the conceptions of cedent and assignee where the thing assigned is the *universitas* of an individual's proprietary rights and obligations, and where the assignation is operated by his death. Where the deceased dies testate, those entitled to succeed him in his estate and the extent of their respective rights are defined by his will. Where, however, he dies intestate, those entitled to succeed and their respective rights are defined by law operating in relation to the circumstances existing as at the date of his death. This law is the law of intestate succession, and it divides the succession into heritable and moveable, the former devolving on the heirs and the latter devolving on the executors.

Heir and Executor.

2. The terms "heir" and "executor" are used in contradistinction to each other to denote that chapter

¹Stair Inst. III., 4, 1.

²Ersk. Inst. III., 8, 1.

of the law of intestacy which centres round the division of the intestate's estate into heritage and moveables, and the consequent separation of interests between the heir and the executor as representing the intestate. In this connection the term heir is used generically as including not only "heir of line," "heir-at-law," or "heirs-portioners," but as also extending to those limited lines of heirs described as "heirs of provision" and "heirs of entail." "Heir" thus is an omnibus expression indicative of the persons who in one category or another represent the deceased ancestor *quoad* heritage. The term "executor," on the other hand, is used historically as being the office by virtue of confirmation in which the intestate's moveable estate is vested in his next-of-kin. It is now the administrative office which stands as representing the various persons entitled to share in the moveable estate, the executor being the only person who can take up the whole moveable estate in the division into heritage and moveables.

3. *HÆRES EST EADEM PERSONA CUM DEFUNCTO*.—The signification of this brocard is that it emphasises the distinction between singular and universal succession. In singular succession the assignee succeeds to the cedent's right in the subject assigned, and to nothing else. Inheritance, however, is a mode of universal succession which in its fullest development in Roman law was described as a succession in which, measured from the point of view of succession, the heir succeeded not so much to the ancestor's proprietary rights and obligations as such, but to the *persona* of his ancestor; or, measured from the point of view of the *universitas* of the ancestor's proprietary rights and obligations, it was a continuation of the ancestor's *persona*.³

³Sohm, "Institutes of Roman Law," 3rd edition (translated Ledlie), pp. 503-505.

4. In Scots law, where a division of the inheritance into heritable and moveable has been adopted, the *hæres* in the sense of the brocard includes both the heir and the executor; the defunct's *persona* being regarded as continued in an aggregation of *hæredes* the extent of whose rights and obligations differ at least in questions among themselves. "When heirs are of diverse kinds
 "as some in moveables, some in lands, and other heritable rights; and of these according to the investiture
 "some succeed to lands provided to heirs of line, some
 "to lands provided to heirs male, some to lands otherwise tailzied; in all which some heirs succeed alone
 "and *in solidum*, some succeed *in parte et pro rata*;
 "yet all may be said to succeed *in universum jus quod defunctus habuit.*"⁴ It is thus the heir and executor jointly who represent the intestate in the totality of his proprietary rights: And they represent him severally in his obligations in all questions with third parties.⁵

5. In the devolution of the *universitas* of the deceased's rights and obligations the heirs and executors in a question *inter se* bear respectively the obligations of the deceased according as they affect heritage or are personal in their nature. In addition to obligations which were due by the deceased in his lifetime, and which may be said to devolve on his death, there are certain other obligations not due by the deceased during his lifetime, but which may become due *ex lege* on his death, and which fall to be borne either by his heir or by his executor.

6. LEGAL RIGHTS.—Where the intestate was a married person, the succession to his or her heritable and moveable estate may be burdened not only by his

⁴ Stair Inst. III., 4, 23. See also Ersk. Inst. III., 8, 50.

⁵ *Mitchell v. Mackersy*, 1905, 8 F. 198.

or her debts, but also by the legal rights of his or her spouse and children, becoming due *ex lege* on his or her death. These legal rights are neither, properly speaking, debts due by the deceased nor rights of succession, being postponed to debts and preferable to rights of succession. They are the liferents of courtesy and terce affecting the heritable estate and forming a burden on the heir's succession, and the payments of *jus relictæ*, *jus relictæ*, and legitim affecting the moveable estate and exigible from the executor as *jura crediti*. The legal rights are not affected by any testamentary writings of the deceased, and they arise in testate and intestate succession alike. Courtesy and terce are liferents of the whole, and of one-third of the heritage respectively, and they form a burden on the heir's right of succession, courtesy being the right of the surviving husband and terce the right of the surviving wife. Where the deceased is survived both by a spouse and by children, the free moveable estate falls to be divided into three equal parts, forming (1) the right of the surviving spouse, (2) the legitim fund, and (3) the dead's part. When the deceased is survived either by a spouse or by children, but not by both, the free moveable estate is divided into two equal parts, forming (1) the right of the surviving spouse, or the legitim fund, as the case may be, and (2) the dead's part. It is the dead's part of moveables alone that forms the proper subject of moveable succession *ab intestato*, but it cannot be discussed apart from the consideration of legal rights.

7. Where the deceased was a married man who died intestate domiciled in Scotland without leaving lawful issue and survived by a widow, the widow is entitled to a sum of £500 by statute.⁶ This payment forms a

⁶ Intestate Husband's Estate Acts, 1911 and 1919 (1 & 2 Geo. V. cap. 10; and 9 Geo. V. cap. 9).

charge against the heir and the executor in proportion to the net value of the heritable and moveable estate respectively. The proportion exigible from the executor falls to be deducted from the net moveable estate before the bipartite division of the free moveable estate is made for the purpose of arriving at the amount of the dead's part. The statutory sum is due to the widow only where the husband has died wholly intestate, and is not due by reason only that some property passes in his succession *ab intestato*.⁷

Intestacy.

8. TOTAL INTESTACY.—The law of intestacy governs the succession to the estate of a person who has died having executed no will, or whose will is invalidly executed, or whose will, though validly executed, has been revoked or has come to be of no effect by reason of its terms and construction in relation to the facts existing at his death. Where there is no will, or at least no validly executed will, or where the will has been expressly revoked, the deceased is said to have died intestate, and the statutes and common law applicable to the administration and distribution of intestate estates apply. A will is not impliedly revoked by a subsequent marriage of the testator.⁸ It is a question of circumstances whether a parent's will is impliedly revoked by the subsequent birth of a child.⁹ An implied revocation of a will may bring into operation a prior will which the later will had impliedly revoked.¹ Where there is a validly executed will unrevoked, but all the beneficiaries and executors named in it have predeceased the

⁷ Cf. secs. 8 *et seq.*, *infra*.

⁸ *Westerman's Executor v. Schwab*, 1905, 8 F. 132.

⁹ *Hughes v. Edwards*, 1892, 19 R. (H.L.) 33; *Millar's Trustees v. Millar*, 1893, 20 R. 1040.

¹ *Nicholson v. Nicholson's Tutrix*, 1922 S.C. 649.

maker of the will, so that it can receive no effect at the time of his death, the deceased has also died intestate.² The same result follows where the terms of the will are not intelligible as a disposal of property,³ for the right of the heirs *ab intestato* can only be defeated by a will which creates a beneficial interest in some third person or body of persons.⁴

9. PARTIAL INTESTACY.—Where the deceased leaves a will which is sustained either as disposing of some part of his estate or as an appointment of an executor, the law of intestacy is only applicable subject to qualification. In so far as the will disposes of part of the estate, it would seem to render inapplicable certain statutes⁵ relating to the distribution of the estates of persons dying intestate, because where a person disposes by will of a part of his estate he cannot be said to die intestate.⁶ The Intestate Moveable Succession Acts, however, expressly apply to cases of partial intestacy.⁷ Subject to the inapplicability of certain statutes, the deceased's estate, so far as undisposed of by his will, falls to be distributed according to the law of intestacy.

10. The nomination of an executor was at one time held to be a beneficial disposal of moveable estate in favour of the executor, but it has, since 1855, been a bare administrative appointment.⁸ In so far as the will

² *In re Ford* (1902), 2 Ch. 605; *In re Cuffe* (1908), 2 Ch. 500.

³ *Colvin v. Hutchison*, 1885, 12 R. 947.

⁴ *M'Caig v. University of Glasgow*, 1907 S.C. 231.

⁵ Intestate Husband's Estate Acts, 1911 and 1919 (1 & 2 Geo. V. cap. 10, and 9 Geo. V. cap. 9).

⁶ *Taylor's Executors v. Taylor*, 1918 S.C. 207; *In re Twiggs*, 1892, 1 Ch. 579.

⁷ The Intestate Moveable Succession Act, 1919 (9 & 10 Geo. V. cap. 61), is to be read as one with the Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), which by sec. 9 provides for its application to cases of partial as well as total intestacy.

⁸ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 8.

appoints an executor, or so far as trustees are appointed under it or a general disponent or universal legatory or residuary legatee, any of these may apply for confirmation as executor-nominate.⁹ In such an event the deceased's moveable estate—and if the will contains a general disposition of heritage his heritable estate also—is, as regards vesting and administration, withdrawn from the operation of the law of intestacy. A bare administrative or trust appointment of an executor or trustee, with no beneficial disposal of any part of the estate, will, it is thought, leave his estate to be distributed as if he had died intestate.¹

11. Where the deceased has made no will in the ordinary sense of the term, but has inserted special destinations in his moveable or heritable investments, the destinations will at his death operate to carry the estate to which they are attached away from the heirs *ab intestato*.² Such special destinations may be formally distinguished from a will in respect (1) that they are not executed by the deceased, and (2) that their effect even in relation to moveable property probably depends on the law of the *situs* of the investment, and not, as that of a will of moveables does, on the law of the domicile of succession of the deceased. On the other hand, in substance they resemble a will in respect that they take effect only on death and are until then revocable, and their effect has been described as testamentary.³ “When a testator dies, special destinations—treated *ex lege* as testamentary—and his testamentary writings “as such, are all looked at together, and the only principle of law which is to be of any real use is the

⁹ Executors Act, 1900 (63 & 64 Vict. cap. 55), sec. 3.

¹ See the Lord Justice-Clerk's opinion in *Taylor's Executors v. Taylor*, 1918 S.C. 207, for the meaning of “dying intestate.”

² *Connell's Trustees v. Connell's Trustees*, 1886, 13 R. 1175; *Hare*, 1889, 17 R. 105.

³ *Dennis v. Aitchison*, 1924 S.C. (H.L.) 122.

“principle of getting at, from all these writings put together, what was the testator’s final intention.”⁴ According to this view, it would seem to follow that where a person dies leaving no proper will, but leaving special destinations affecting some of his investments, he cannot be said to have died intestate for the purpose of the Intestate Husband’s Estate Acts.⁵ The question of the effect of special destinations on the applicability of these Acts is, however, an open one.

Opening of Succession.

12. The succession opens to both heritable and moveable estate on the death of the person having right to it, subject to sec. 18, *infra*. It opens in favour of the heir and the executor, being those persons nearest him in propinquity at the date of his death according to the orders of precedence set forth in Chapters III. and VI. These individuals and no others are invested with the right of succession *ab intestato*. Their right of succession is defeated by testacy either wholly or in part, as the case may be. Their right may also be suspended by an apparent testacy.

13. Where at an interval after the deceased’s death, leaving a will apparently disposing of his whole estate, it becomes clear that his will, owing to events which have happened since his death, fails to dispose of the fee of his whole estate, the portion undisposed of falls to those to whom his intestate succession opened at death, and not to those to whom it would have opened had he died at the date of the happening of the event which resulted in intestacy.⁶

⁴ Lord Shaw in *Dennis v. Aitchison*, *supra*, at p. 127.

⁵ 1 & 2 Geo. V. cap. 10, and 9 Geo. V. cap. 9; *Taylor’s Executors v. Taylor*, 1918 S.C. 207.

⁶ *Wilson’s Trustees v. Wilson’s Trustees*, 1894, 22 R. 62.

14. Where a truster by his trust disposition and settlement conveyed his whole estate to trustees with a direction to hold until an event certain, to accumulate the rents of lands from the death of his widow until that event, and then to purchase lands and execute an entail, the truster died in 1857, and the direction to accumulate rents as from and after the death of his widow, which happened in 1889, was null and void under the Thellusson Act. The fee of the estate had not vested beneficially in any one, but was in suspense until the happening of the event certain. A question arose as to who was entitled *ab intestato* to the rents accruing after 1889 and undisposed of by the settlement. The truster's heir-at-law had died in 1858 without succeeding to any right in the deceased's estate. The Court held that the person entitled to each rent was the person who would have been the *fiar* at the date when each rent fell due had the fee of the heritable estate descended in the ordinary course of intestate succession.⁷ The principle applied is set forth in the opinion of Lord Rutherford Clark as follows:—"If the truster had died intestate, and the
"law of intestate succession had run its ordinary course,
"he (the heir-at-law) would have been entitled to the
"estate itself and to the rents. The legal succession has
"been so far excluded by the fact that the estate has
"been conveyed to trustees in order that they may
"execute an entail at a future time, but to no further
"extent. It is a plain principle of law that the rights
"of the heir cannot be defeated except by a conveyance
"in favour of another, and whatever is not so conveyed
"remains with the heir. It follows, I think, that until
"the time arrives at which the trustees are directed to
"entail they hold for the benefit of the successive heirs-
"at-law, who are therefore entitled to the rents as they

⁷ *Campbell's Trustees v. Campbell*, 1891, 18 R. 992.

“ become due. They will take them—not in a representative capacity (*i.e.*, not as representing the heir-at-law of the trustor), but in their own right.”⁸

15. *Semel hæres semper hæres*.—Succession has been said in sec. 1, *supra*, to involve the conceptions of cedent and assignee, and it may further be said that in intestate succession these must be mortal persons who have had existence at the same moment of time. As succession not only opens on the death of the intestate, but also vests then, it follows that the subsequent emergence of an individual who, if in existence then would have been nearer in propinquity, cannot defeat the right which has vested.⁹ A child which was *in utero* at the date when the succession opened is, on birth, treated as having been in life at the opening of the succession for all the purposes of succession *ab intestato*.¹ The condition of a uterine child's right is that it should be born alive, and the effect of its prenatal death is that it never had a right of succession. But the rule *semel hæres semper hæres*, as above explained, is true only of legal heirs. Heirs who succeed by virtue of conventional provisions may be divested of their right by the emergence of a nearer heir of provision not conceived at the date when the succession opened, if that was the intention of the settler.

Right to Succeed.

16. When a succession has opened, the right to succeed *ab intestato* either as heir or as executor depends on (1) legitimacy, and (2) survivance. Legitimacy is

⁸ Lord Rutherford Clark in *Campbell's Trustees v. Campbell*, *supra*, at p. 1009.

⁹ Bell's Prin., 10th edition, sec. 1642.

¹ *Grant v. Grant's Trustees*, 1859, 22 D. 53; *Jervey v. Watt*, 1762, M. 8170.

the foundation of rights of succession *ab intestato* in the sense that the person claiming the right to succeed must trace his propinquity to the intestate solely through steps of relationship recognised by law, as depending on blood.² In Scots law a person is legitimate when he is born in wedlock or has been legitimated by the subsequent marriage of his parents.³ Marriage itself and relationship by affinity do not give rise to rights of succession *ab intestato*. Natural relationship, as that of a bastard to his father or mother, or to his natural brothers and sisters, unless legitimated by the subsequent marriage of the parents or otherwise, does not give rise to rights of succession *ab intestato*.

17. As intestate succession has place only between mortal persons, the death of an intestate and the survival of persons who claim right to succeed *ab intestato* are matters of fact which require to be established by evidence.⁴ In common calamity, where no evidence is available as to the order in which death took place, no presumption of law as to predecease or survival arises from a comparison of ages or of states of health. There is a presumption of law in favour of the continuance in life of any person who has disappeared, and apparently no precise age (as between eighty and one hundred years) has been fixed at which the presumption of life flies off.⁵

18. Under the Presumption of Life Limitation Act, 1891, a person who has disappeared and not been heard of for seven years may be pronounced by the Scottish

² Bell's Prin., 10th edition, sec. 1643.

³ *Ibid.*, sec. 1624.

⁴ *Bruce v. Smith*, 1871, 10 M. 130; *Stewart's Trustees v. Stewart*, 1875, 2 R. 488; *Rhind's Trustees v. Bell*, 1878, 5 R. 527; *Tait's Factor v. Meikle*, 1890, 17 R. 1182.

⁵ See the authorities cited in *Greig v. Merchant Company of Edinburgh*, 1921 S.C. 76.

Courts to have died at a particular date within the seven years, or exactly on the expiry of the seven years, to the effect of opening, as at the date fixed, the succession to his heritable estate in Scotland, and the succession to his moveable estate if he was domiciled in Scotland, but to the extent only of making up titles to these estates.⁶ On the elapse of thirteen years from the date on which titles were made up, the absent person is barred from recovering his estate.⁷ The Act does not apply to policies of insurance.⁸

19. BARS TO SUCCESSION.—Corruption of blood is the most important bar to succession, and is operated by judicial conviction of crimes such as treason.⁹ The corruption of blood affects not only the person convicted but his descendants in the sense that neither the person convicted, nor any one requiring, for the purposes of a particular succession, to trace descent through the convicted person, can inherit.¹ A sentence of fugitation, in principle, operates as a bar to the outlaw succeeding to an inheritance while the sentence remains unrecalled. Escheats and forfeitures in themselves do not bar the right of succession, but may affect its value. Aliens and papists were formerly barred from succession, but the bar has been withdrawn.²

20. BASTARDS.—Legitimacy is the necessary and only bond of relationship by blood. As there is no relationship between a bastard and his natural parents, or

⁶ 54 & 55 Vict. cap. 29, sec. 1.

⁷ *Ibid.*, sec. 7.

⁸ *Ibid.*, sec. 11.

⁹ 7 Anne cap. 21, sec. 5.

¹ Ersk. Inst. IV., 4, 26; *Earl of Perth v. Lady Willoughby d'Eresby's Trustees*, 1869, 7 M. 642; 1871, 9 M. (H.L.) 83.

² Naturalisation Act, 1870 (33 Vict. cap. 14), sec. 2, and 10 Geo. IV. cap. 7, sec. 23. See also *Earl of Perth v. Lady Willoughby d'Eresby's Trustees*, *supra*.

between a bastard and his natural brothers and sisters, they cannot succeed to him, and he cannot succeed to them. Nor can a bastard's descendants succeed to his natural parents or to their relatives, he and his lawful descendants being related in isolation *inter se*. A suggestion has been made by one textwriter³ that the right to legitim given in a mother's estate by the Married Woman's Property Act, 1881,⁴ is given in terms sufficiently wide to benefit an illegitimate child to the extent of taking legitim in its mother's estate. The right given by the statute is, however, defined to be "the same right of legitim in regard to her (a married woman's) moveable estate which they (her children) have according to the law and practice of Scotland in regard to the moveable estate of their deceased father." The only children of a married woman who have a right of legitim in their father's estate are her legitimate children. Accordingly, the statute does not support the view suggested by the textwriter mentioned.

21. *ULTIMUS HÆRES*.—Where the intestate has no relatives in life at his death who are entitled to succeed by reason of their propinquity, his heritable and moveable estate falls to the Crown as *ultimus hæres*. A failure of heirs may occur either where no one can establish precedence of propinquity to the deceased, or where no one has any propinquity with the deceased by reason of his having been a bastard or the last heir of a bastard. The Crown's right seems now to be a right of succession *ab intestato*,⁵ although formerly⁶ there was a distinction

³ Cameron, "Intestate Succession," 2nd edition, p. 126.

⁴ 44 & 45 Vict. cap. 21, sec. 7.

⁵ *Goldie v. Murray*, 1753, M. 3183; *Brock v. Cochrane*, 2nd Feb., 1809, F.C.; *Torrie v. King's Remembrancer*, 1832, 10 S. 597 (but not a right of succession as heir of provision).

⁶ Prior to the Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 12.

in that an heir was liable for his ancestor's debts without limitation, whereas the Crown was only liable *secundum vires hæreditatis*. In recent years the Crown has unsuccessfully opposed applications for the appointment of judicial factors on the estates of intestates whose heirs have not been traced.⁷

⁷ *Handyside v. Lord Advocate*, 1909, 1 S.L.T. 268; *Murray v. Lord Advocate*, 1916, 1 S.L.T. 369.

CHAPTER II.

PRIVATE INTERNATIONAL LAW OF SUCCESSION.

THE LEX SITUS, s. 24.

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DOMICILE, s. 28.

22. The law of intestate succession as administered by the Scottish Courts is not confined to the purely municipal law of Scotland alone, but also extends to and includes those rules of Scots law which determine what system of law governs the rights arising from any particular category of the facts involved. Questions as to what system of law governs a particular category of facts were formerly referred to in our books and practice as being questions of foreign law, but, in consonance with more recent nomenclature, are now referred to as being questions of private international law, or, more shortly, international law. Broadly speaking, the municipal law of any territory only regulates intestate succession where it applies. The anterior question, What municipal law is applicable? is one which is answered by the international law of the territory in which the question arises for decision. Corporeal things, and proprietary rights and obligations, which together form the substance of succession, may in the last resort be vindicable only under one or other of divers systems of law, and reciprocity of interest in the administration of legal systems has tended to produce a certain uniformity of practice in regard to the extent to which each system of law recognises the applicability of the others. In this way there has arisen a body of

rules which is accepted in common by different territorial systems of law and which is sometimes spoken of by jurists in an abstract sense as itself forming a non-territorial system of law. It is, however, with international law as administered in the Scottish Courts that this chapter is primarily concerned.

23. The general rule of private international law is that the succession to an immoveable property is determined by the law of the place where the immoveable is situated, and the succession to moveable property is determined by the law of the domicile of succession of the deceased at the date of his death. This general rule raises a number of questions, viz., What law determines whether the property is moveable or immoveable? and What law determines the testacy or intestacy of the deceased? and What law determines the rights of persons to succeed on intestacy?

The *lex situs*.

24. The *lex situs* determines the character of the property as moveable or immoveable. This rule is of literal application where the property is a corporeal, except in the case of ships and their cargoes on the high seas, which, however, do not appear to be claimed as immoveables under any territorial law. In the case of incorporeal rights affecting corporeal subjects, the *situs* of the corporeal is deemed to be also the *situs* of the rights affecting it. Thus the character of a bond over Scots heritage is determined by Scots law, and the character of a mortgage over English land is determined by English law.¹ An interest in a fund is moveable or

¹ *Train v. Train's Executrix*, 1889, 2 F. 146; *Monteith v. Monteith's Trustees*, 1882, 9 R. 982. See also *Buccleugh v. Hoare*, 1819, 4 Madd. 467, where the debt was secured over both Scots and English estates.

immoveable according to the law of the territory in which the fund is being administered, which is deemed to be the *lex situs* for this purpose.² In the case of British Government funds it is doubtful whether the Scottish Courts would regard the *situs* as being other than Scotland.³ The *situs* of a contractual right such as a personal bond is generally deemed to be the place where the contract was entered into and to be performed. Where the contract was entered into in one territory, to be performed in another, it would probably fall to be regarded as a moveable or immoveable right according to the law of the *forum* for its enforcement. Mere personal debts, however, are like ships, regarded generally as moveable, and questions as to their *situs* for this purpose do not appear likely to arise.

25. Where any property is claimed by the law of its *situs* as an immoveable, the succession to it on the death of its owner is determined also by the *lex situs* irrespective of the law of the deceased's domicile of succession.⁴ Accordingly, it falls to the *lex situs* to determine, in regard to immoveables, (1) whether the mode of succession is testate or intestate, and (2) who are the persons entitled to succeed on intestacy.

26. Formerly an owner of immoveables in Scotland could not effectually dispose thereof by a testament to take effect only at his death, even although the testament was framed and executed in a country by the law of which immoveable property was disposable by will, it being requisite that *de presenti* words of conveyance should be used in the deed in order to carry heritage.⁵

² *Clarke v. Newmarsh*, 1836, 14 S. 488; *Moss's Trustees v. Moss*, 1916, 2 S.L.T. 31; *Kelly v. Selwyn*, 1905, 2 Ch. 117.

³ *Cunningham's Trustees v. Cunningham*, 1924 S.C. 581.

⁴ *Train v. Train's Executrix*, 1899, 2 F. 146; *Hewit's Trustees v. Lawson*, 1891, 18 R. 793; *Brown v. Gregson*, 1920 S.C. (H.L.) 87.

⁵ Bell's Prin., 10th edition, sec. 1692.

The former law was altered by the Titles to Land Consolidation Act, 1868, which enacted⁶ that after the date of its commencement it should be competent to any owner of lands to settle the succession to the same in the event of his death not only by conveyances *de presenti* but likewise by testamentary or *mortis causa* deeds or writings, and that a deed or writing (1) purporting to convey or bequeath the lands, or (2) containing with reference to the lands words which would, if used in a testament with reference to moveables, be sufficient to confer upon the executor a right to claim and receive the same, should, if duly executed *in the manner required or permitted* in the case of any testamentary writing by the law of Scotland, be held to create in favour of the grantee an obligation upon the heir of the grantor of the deed or writing to convey the lands to such grantee. The manner of execution "required or permitted" by the law of Scotland in the case of any testamentary writing in the sense of that section related to testaments of moveables (for Scots law neither "required nor permitted" in the case of any other testament), and therefore also related to the testament of a person domiciled in Scotland at the date of his death. The common law of Scotland in its purely municipal aspect "required" the testament of moveables of a domiciled Scotsman when in writing to be either a probative or a holograph writ, but also in its wider aspect "permitted" that his testament should be sustained as disposing of his moveables if executed according to the form of the law of his domicile at the time it was made, or of the law of the place where it was made.⁷ In addition to permitting the

⁶ 31 & 32 Vict. cap. 101, sec. 20.

⁷ *Purvis' Trustees v. Purvis' Executors*, 1861, 23 D. 812; *Macdonald v. Cuthbertson*, 1890, 18 R. 101, Lord President Inglis at p. 104; *Connel's Trustees v. Connel*, 1872, 10 M. 627; *Westerman's Executor v. Schwab*, 1905, 8 F. 132, Lord President Dunedin at p. 136.

validity at common law of wills executed in the form of the law of the domicile or of the *locus actus*, the Scottish Courts, under the Wills Act, 1861,⁸ further permitted the validity of wills of British subjects, made outside the United Kingdom in the form prescribed by the law of the maker's domicile of origin where that was a domicile of origin within His Majesty's dominions and where the deceased subsequently acquired and possessed at his death a domicile of succession in Scotland.⁹ Accordingly, the law of Scotland immediately prior to 1868 required or permitted wills to be executed in one or other of the forms of (1) the municipal law of Scotland, (2) the law of the maker's domicile at the time of making, (3) the *lex loci actus*, and (4) the law of the domicile of origin of the maker where that was a domicile in a territory within His Majesty's dominions, and when the will was made by a British subject outside the United Kingdom. Under sec. 20 of the Titles to Land Consolidation Act, 1868, a will executed in one or other of these four categories, and subject to the caveats as regards (4), is effective as a testamentary settlement of Scottish heritage, provided that at the date of executing the will the maker thereof had attained twenty-one years of age.¹ With regard to the sufficiency of the language used in the will as a conveyance of Scottish heritage, see the case noted² and the authorities cited there. Where an owner of Scottish heritage dies without leaving a will duly executed and habile in its terms as described above, or dies leaving a will which has failed in whole or in part in the sense of

⁸ 24 & 25 Vict. cap. 114.

⁹ The remaining provisions of secs. 1 and 2 of the statute did not extend the common law of Scotland.

¹ *Connel's Trustees v. Connel*, *supra*; *Studd v. Cook*, 1883, 10 R. (H.L.) 53; *Brown, Petitioner*, 1882, 20 S.L.R. 76; *Cunynghame*, 1797 M. 8966.

² *Crowe v. Cook*, 1908 S.C. 1178.

secs. 8 *et seq.*, *supra*, the succession is regulated by the Scots law of intestate succession irrespective of domicile.

27. In any question relating to the succession to Scottish heritage on the death of an intestate wherever he may be domiciled, the heir entitled to succeed is that kinsman of the intestate which Scots municipal law points out as having precedence of propinquity as explained in Chapter III. The Sheriff Court of Chancery and the territorial Sheriff Courts in Scotland are the only competent tribunals to determine which kinsman is *hæres propinquior*,³ and they administer this jurisdiction according to the municipal law of Scotland alone. Where, however, a question is raised as to the legitimacy or status of a person claiming to be *hæres propinquior*, it falls to be determined by Scots law generally, which in turn refers the question to the law of that person's father's domicile at the date of birth or legitimation.⁴ It is probable, however, that the general law of Scotland would only sustain the legitimacy conferred by the law of the father's domicile when that conferment purported to be based on his monogamous marriage.⁵ The liferent servitudes of courtesy and terce which affect Scottish heritage on the death of the owner survived by a spouse, or on the divorce of the owner, are created by virtue of the municipal law wherever the owner may have been domiciled. In the case of heritable securities over Scottish land which are moveable in the succession of the creditor under the Titles to Land Consolidation Act, 1868,⁶ but which remain heritable *quoad* terce and

³ *Bosville v. Lord Macdonald*, 1910 S.C. 597.

⁴ *Dalhousie v. M'Douall*, 1840, 7 Cl. & Fin. 817; *Munro v. Munro*, 1840, 7 Cl. & Fin. 842; *Lauderdale Peerage* case, 1885, 10 App.Cas. 692.

⁵ Cf. *Atkinson v. Anderson*, 1882, 21 Ch.D. 100; and *Ullee, the Nawab Nazim of Bengal's Infants*, 1885, 53 L.T. N.S. 711, and 54 L.T. N.S. 286. See also *Fenton v. Livingstone*, 1859, 3 Macq. 497.

⁶ 31 & 32 Vict. cap. 101, sec. 117.

courtesy, a widow is entitled under Scots law to terce from that subject, notwithstanding that she may, under the law of her husband's domicile of succession, also be entitled to a share of it as one of her husband's heirs *in mobilibus*.⁷ Where in a claim for courtesy or terce any question is raised as to the validity of the marriage of the spouse claiming, such a question is determined by Scots law in accordance with the law of the place where the marriage was celebrated; provided probably that it was a monogamous marriage. Where such a claim is founded on divorce, the validity thereof is recognised by Scots law, provided it is granted by the Courts of the territory where the husband was domiciled at the time.

Domicile.

28. The domicile of succession of a deceased person is his domicile of origin, unless and until it is satisfactorily established that *animo et facto* he had acquired a domicile of choice in another country.⁸ Every person is necessarily domiciled in one country or another from birth, and no person can have more than one domicile at the same time. For the purpose of domicile a country is any tract of land having one system of territorial law.

29. DOMICILE OF ORIGIN.—The domicile of origin (1) of a foundling is the place where it was found, (2) of a bastard or a posthumous child is the domicile of its mother at the time of birth, and (3) of a child born legitimate in its father's lifetime is the domicile of its father at the time of birth. A pupil child, or a person who has never been *sui juris*, when legitimated *per subsequens matrimonium*, takes the domicile of the father at the time of legitimation. The domicile of a pupil

⁷ *Train v. Train's Executrix*, 1899, 2 F. 146.

⁸ *Winans v. Attorney-General*, [1904] A.C. 287.

child, or a person who has never been *sui juris*, changes with the domicile of the parents, *i.e.*, of the mother in the case of a child having no father, and of the father in the case of a legitimate child. A woman on marriage takes the domicile of her husband, and her domicile continues to follow that of her husband during the marriage,⁹ notwithstanding that she may have been judicially separated from him *a mensa et thoro*.¹

30. DOMICILE OF CHOICE.—Any person who is *sui juris* and not a married woman may at any time acquire a domicile of choice *animo et facto*. Such acquisition may involve a change from the domicile of origin, or a change from one domicile of choice to another. The mere *animus* or intention to leave a country and to reside in another country is not enough to effect a change of domicile.² The intention to leave must have advanced from the stage of preparation to that of accomplishment in order to supply the necessary element of fact. When the intended change is from origin to choice, there must probably be the actual fact of arrival in the country of choice, but when the intended change is from a domicile of choice, the fact of leaving the country is sufficient compliance with the requirement of fact.³ Where a person has in fact arrived in the new country, it is necessary in order to support the acquisition of a domicile of choice to establish satisfactorily that he intended to reside there permanently as the place of his home.⁴ A domicile of origin cannot be aban-

⁹ *Carswell v. Carswell*, 1881, 8 R. 901.

¹ *Dolphin v. Robins*, 1859, 7 H.L. 416; *Mackinnon's Trustees v. Inland Revenue*, 1920 S.C. (H.L.) 171; *Attorney-General of Alberta v. Cook*, [1926] A.C. 444.

² *Chalmers v. Wingfield*, 1887, 36 Ch.D. 400.

³ *Re Bianchi*, 1852, 3 S. & T. 16; *Forbes v. Forbes*, 1854, Kay, 354.

⁴ *Whicker v. Hume*, 1858, 7 H.L. 124; *Moorhouse v. Lord*, 1863, 10 H.L. 272; *Winans v. Attorney-General*, [1904] A.C. 287; *Huntly v. Gaskell*, 1905, 8 F. (H.L.) 4.

doned, and is only superseded by a domicile of choice while that is retained. On leaving a domicile of choice for an unsettled life, a person's domicile of origin revives although he may not have returned to his country of origin.⁵ The acquisition by a British subject of a domicile of choice in any particular foreign State may be affected by the existence of a convention between His Majesty and that foreign State in cases where such British subject has not been resident abroad for over a year, and has not deposited the statutory declaration of intention to acquire a domicile of choice.⁶ The statute referred to contains a reciprocal provision for conventions relating to the acquisition by a foreigner of a domicile of choice in Great Britain and Ireland.

31. Where the deceased has died leaving moveable estate, the succession thereto is determined by the law of his domicile at the time of his death, irrespective of the law of the territories in which such moveable estate may be situated.⁷ This rule does not mean that the Courts of the country of the domicile alone have jurisdiction to entertain all questions arising out of the moveable succession of the deceased. "So far as
"relates to domicile, it has always appeared to me to
"be clear that the domicile of a deceased testator or
"intestate cannot, in principle, furnish any governing
"or necessary rule, except for the purpose of deter-
"mining the succession to moveable estate. For that
"purpose recourse must be had, not always or neces-
"sarily to the Courts, but always and necessarily to the
"law of the domicile. The succession being once ascer-
"tained, the rights resulting therefrom belong to, and
"follow the person of the living successor, and not the

⁵ *Udny v. Udny*, 1869, L.R., 1 S. & D.H. 441; *King v. Foxwell*, 1876, 3 Ch.D. 518.

⁶ Domicile Act, 1861 (24 & 25 Vict. cap. 121).

⁷ *Train v. Train's Executrix*, 1899, 2 F. 146.

dead predecessor.”⁸ Accordingly, the law of the deceased’s domicile determines (1) whether the deceased died testate or intestate *quoad* his moveable estate, and (2) who are the persons entitled to succeed thereto on intestacy.

32. In order to regulate the succession in moveables to a domiciled Scotsman, his will at common law must be executed either according to the forms of Scots municipal law, or according to the forms of the law of the maker’s domicile at the time of making the will, or the law of the place where it was executed.⁹ A minor person, above the age of twelve years in the case of a girl or above the age of fourteen years in the case of a boy, may make a will of moveables, without the consent of curators. In addition to written wills executed by attestation or holograph of the granter, the municipal law of Scotland sustains verbal legacies to the extent of £100 Scots, but not a verbal will as an appointment of executors.¹ The effect of the Wills Act, 1861,² so far as applicable to the will of a person dying a domiciled Scotsman which at

⁸ Per Lord Chancellor Selborne in *Orr Ewing’s Trustees v. Orr Ewing*, 1885, 13 R. (H.L.) 1, at p. 5.

⁹ *Purvis’ Trustees v. Purvis’ Executors*, 1861, 23 D. 812; *Macdonald v. Cuthbertson*, 1890, 18 R. 101, Lord President Inglis at p. 104; *Connel’s Trustees v. Connel*, 1872, 10 M. 627; *Westerman’s Executor v. Schwab*, 1905, 8 F. 132, Lord President Dunedin at p. 136.

¹ Ersk. Inst. III., 9, 7. See also *Hannah’s Legatees*, 1738, M. 3837, where the Court held that the executor of a written will, having acknowledged that the deceased requested him to distribute the residue in a certain manner, was bound by that verbal direction, notwithstanding that the residue exceeded £100 Scots. At that date the appointment of executor was a beneficial appointment, and the interest to deny the verbal legacy of residue was in the executor. Since the Intestate Moveable Succession Act, 1855, sec. 8, the appointment of an executor-nominate has been a bare administrative appointment, and the interest to deny the verbal legacy of residue undisposed of by the written will would now be not in the executor-nominate, but in the heirs in *mobilibus*. Cf. *Farquhar v. Farquhar*, 1886, 13 R. 596, and *Forsyth’s Trustees v. Maclean*, 1854, 16 D. 343.

² 24 & 25 Vict. cap. 114; and cf. sec. 26, *supra*.

common law would have been invalid, has been to sustain the will when executed by a British subject outwith the United Kingdom in the form of the law of his domicile of origin where that was within His Majesty's dominions. The will of a person dying a domiciled Scotsman, when not executed either in accordance with the forms (1) of Scots municipal law, (2) of the law of his domicile at the time of making the will, (3) of the *lex loci actus*, or (4) permitted by the Wills Act, 1861, as above, does not become valid by reason of having been admitted to probate elsewhere.³ When the will has been validly executed as above, but a question arises as to whether it has been revoked or invalidated by an event subsequent, the determination of that question depends, in Scots law, upon the law of the domicile of the deceased at the time of the event founded on in support of its revocation or invalidity.⁴ Where, however, the only event relied on as revoking or invalidating the will is a change of the maker's domicile subsequent to the date of the will, the deed remains valid.⁵ While, therefore, an Englishwoman on marrying a Scotsman acquires a Scots domicile, and her will is thereby exempted from the revocation which in English law is the effect of marriage, a Scotswoman's will on her marriage to an Englishman, and consequent acquisition of an English domicile, would be revoked by English law as the effect of marriage. But the view has been expressed in the Scottish Court that a Scotswoman's testamentary disposition contained in her antenuptial marriage contract is not a will revocable by her marriage to an Englishman.⁶

³ *Bradford v. Young*, 1884, 11 R. 1135.

⁴ *Loustalan v. Loustalan*, L.R. [1900] P. 211; *Westerman's Executor v. Schwab*, 1905, 8 F. 132.

⁵ Wills Act, 1861 (24 & 25 Vict. cap. 114), sec. 3.

⁶ *Battye's Trustees v. Battye*, 1917 S.C. 385, Lord Skerrington at p. 395. See also *Lister's Judicial Factor v. Syme*, 1914 S.C. 204.

33. Where on intestacy the moveable succession to a deceased person falls to be determined by Scots law by reason of the domicile of succession having been in Scotland at the date of death, the persons entitled to succeed and the nature of their respective rights are determined according to the rules of Scots municipal law, as described in Chapter VI. In estimating the extent of their rights the amount of the moveable estate for division may be affected by the attitude of the *lex situs* in regarding estates situated abroad as immoveable or as moveable.⁷ And where legal rights are claimed under Scots law, the necessity for surrendering to the purposes of a will conventional provisions of immoveables situated abroad depends upon whether under the law of the *situs* that surrender could be made effectively.⁸ Questions as to the personal *status* of those claiming rights under Scots law to succeed *ab intestato* are, however, referred, in the case of legitimacy, to the law of the domicile of the father at birth, in the case of marriage to the law of the *locus actus*, and in the case of divorce to the law of the husband's domicile.⁹

⁷ *Monteith v. Monteith's Trustees*, 1882, 9 R. 982.

⁸ *Hewit's Trustees v. Lawson*, 1891, 18 R. 793; *Brown's Trustees v. Gregson*, 1920 S.C. (H.L.) 87.

⁹ Cf. sec. 27, *supra*.

CHAPTER III.

DESCENT OF HERITABLE ESTATES.

HERITABLE ESTATES, s. 34.	HEIRS OF LINE, s. 40.
HEIRS-AT-LAW, s. 37.	HEIRS OF CONQUEST, s. 45.
HEIRS OF PROVISION, s. 46.	

Heritable Estates.

34. It is the rule of private international law as described in secs. 23 *et seq.*, *supra*, that immoveable property is governed by the *lex loci rei sitæ*, which determines (1) whether any particular piece of property is moveable or immoveable, and (2) the order of succession to immoveable property. In Scots law all heritable estates are accounted immoveable in the private international law sense, and heritable estates are descendable to heirs as distinguished from executors. Heritable estates may be described as comprising the land of Scotland with the corporeals *fundo annexa*, excepting crops of yearly growth, and as including generally rights affecting the land, rights having a tract of future time, and rights in their nature not divisible.¹

35. Heritable estates are created by written grants which have for the most part been feudalised with the result of splitting up what, corporeally speaking, are units into two or more incorporeal feudal estates held on feudal titles and separately descendable to heirs. Personal rights to feudal estates are heritable and de-

¹ Ersk. Inst. II., 2, 4-6.

scendable to heirs as being rights affecting land. Such personal heritable rights may be created either conventionally as by an unfeudalised conveyance or by force of statute.² Some heritable estates, never having been feudalised, remain allodial, such as udal lands in Orkney and Shetland, long leases of land which have not been registered under the Registration Act,³ and patents of nobility and hereditary offices.⁴ In addition to heritable estates held on written grants, there is another class of lesser rights heritable by accession, and for the purpose of succession deemed to form part of the estate to which they are accessory. Accessory rights include such incorporeals as teinds in the hands of the titular, and salmon fishings where these have not been feudalised and erected into substantive estates, and also prædial servitudes and other appanages of land incapable of being held as other than accessory.⁵

36. Formerly heirship moveables comprising select articles of household furniture, farm implements, and stock were heritable, and descended to the heir as accessory to the land, but these now belong to the executor as moveable estate.⁶ Bonds and dispositions in security were formerly heritable as affecting land, but now, unless conceived in favour of heirs excluding executors, or unless declared heritable by a statutory minute, they are moveable in the succession to the creditor, but remain heritable *quoad* the legal rights of courtesy and terce, *jus relictæ* and *legitim*.⁷ Personal bonds after the term

² Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 9.

³ Registration of Lands Act, 1857 (20 & 21 Vict. cap. 26), and Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), secs. 24 and 47.

⁴ Patents of nobility and hereditary offices, though they are heritable estates, are not heritable property. Cf. *Earl of Lauderdale v. Scrimgeour Wedderburn*, 1910 S.C. (H.L.) 35.

⁵ Cf. sec. 128, *infra*.

⁶ Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 160.

⁷ *Ibid.*, sec. 117.

of payment were formerly heritable as having a tract of future time, but are now moveable in succession, and also as regards *jus relictæ* and *legitim*.⁸

Heirs-at-Law.

37. Heritable property descends to the heirs of an intestate in the line of succession prescribed by law, except in the case of heritable estates the fee in which has been limited to a line of heirs of provision. The order of succession prescribed by law is an order of precedence in propinquity in which there can be reckoned only those degrees of relationship to the intestate as explained in secs. 16 and 27, *supra*, and as limited in sec. 39, *infra*. This order of succession shows the precedence of potential rights to succeed irrespective of the date of the death on which the succession will open. The relative or group of relatives having precedence of propinquity to the intestate at the date of his death is then, and then only, irrevocably entitled to a right of succession and to the character of heir. The relative nearest in propinquity at any particular period of the intestate's lifetime is sometimes spoken of as the heir-presumptive or heir-apparent. Formerly during the interval between the opening of the succession and the date of taking up the succession by service he who was nearest in propinquity when the succession opened was called the apparent heir, because it was in his power to vest himself with the character of heir. The state of apparency was abolished in 1874.⁹ Relationship propinquity and heirship are distinct

⁸ 1661, cap. 32, and Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 22 (1). Cf. the former law illustrated in *Bennett's Executrix v. Bennett's Executors*, 1907 S.C. 598; *Stark v. Stark*, 1910 S.C. 397, and *Stewart's Trustees v. Battcock*, 1914 S.C. 179.

⁹ Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 9; *M'Adam v. M'Adam*, 1879, 6 R. 1256.

legal conceptions, in respect that relationship depends on the law of the domicile, while propinquity depends solely on Scots law, and, while relationship and propinquity may exist independently of death, heirship never can.¹

38. CATEGORIES OF PROPINQUITY.—The relatives (subject to secs. 16, 27, and 39) of the intestate may, for the purposes of explaining the legal order of succession to heritage, be divided into four main categories of propinquity to the intestate, viz.:—(1) descendants, (2) collaterals, (3) lineal ascendants, and (4) collateral ascendants. Where the intestate is survived by descendants (*i.e.*, his own children and their issue to the remotest degree), they are entitled to succeed subject to secs. 40 and 43, to the exclusion of his collaterals and ascendants, whether lineal or collateral. If the intestate is not survived by any of his descendants, his succession next branches out to his own collaterals (*i.e.*, his brothers and sisters, subject to secs. 41 and 43), to the exclusion of his ascendants, whether lineal or collateral. If the intestate is not survived either by any descendant or by any of his own collaterals, his succession next ascends; firstly, to his lineal ascendant of the first degree (*i.e.*, his father), whom failing, to his collateral ascendants of the first degree (*i.e.*, his father's brothers and sisters, subject to secs. 42 and 43); secondly, to his lineal ascendant of the second degree (*i.e.*, his paternal grandfather), whom failing, to his collateral ascendants of the second degree (*i.e.*, his paternal grandfather's brothers and sisters, subject to secs. 42 and 43); and, further, the succession ascends so on *in infinitum*, in each degree the lineal ascendant succeeding before the collateral ascendants.² Where no relatives having pro-

¹ *Todd v. Mackenzie*, 1874, 1 R. 1203.

² *Stair Inst.* III., 4, 3-7; *Ersk. Inst.* III., 8, 5-9; *Bell's Prin.*, 10th edition, secs. 1655 *et seq.*

pinquity exist, or can be traced, the Crown takes as *ultimus hæres*.³

39. RELATIONSHIP AND PROPINQUITY.—In the four main categories of propinquity described in sec. 38 certain general rules and doctrines apply, some of which may be regarded as negative and as limitative of the meaning of relationship. These negative rules are (1) that relationship by marriage or by affinity and relationship by the half-blood uterine are not reckoned propinquity for the purpose of succession in heritage, and (2) that heritage never ascends to or through a mother. It is thus only the full blood and the half-blood consanguinean (*i.e.*, persons who trace their relationship through a common father) who count in collateral propinquity. Among lineal relatives the succession may descend to or through females, but cannot ascend to or through a mother, so that a child may have propinquity to its mother, but a mother has no propinquity to her child.⁴ Those only are accounted collateral ascendants who are collaterals of the strictly paternal line of ascent.

Heirs of Line.

40. DESCENDANTS.—Among children of the intestate sons are nearer in propinquity to the intestate than daughters, and among sons the elder is nearer than the younger, according to the rule of primogeniture. Daughters are all of equal propinquity to their parent. No distinction is made between children of the intestate by reason only of their being the children of different marriages. As regards the descendants of children, this section is subject to the rule of representation stated in

³ Cf. sec. 21, *supra*.

⁴ This law was not affected by the Intestate Moveable Succession Act, 1919 (9 & 10 Geo. V. cap. 61).

sec. 43. For the rights of a posthumous child, see sec. 15.

41. COLLATERALS.—Among brothers and sisters of the intestate those related to the intestate by the full blood are nearer in propinquity than those related by the half-blood consanguinean. Among brothers and sisters of equal blood brothers are nearer than sisters. Among brothers of equal blood the younger brothers of the intestate are nearer than the elder brothers, because heritage tends to descend. Among younger brothers the elder is nearer than the younger, according to the rule of primogeniture. Among elder brothers the younger is nearer than the elder, because heritage ascends only step by step. Sisters of equal blood are all of equal propinquity. As regards brothers and sisters uterine, see sec. 39. The rule of representation stated in sec. 43 applies in favour of the descendants of brothers and sisters having propinquity. For the rights of a posthumous child, see sec. 15.

42. THE ASCENDING LINE.—The lineal ascendants who have propinquity consist exclusively (in consequence of the rule in sec. 39) of the intestate's father, his father's father, and so on *in infinitum* in the agnatic or strictly paternal order of ascent, so that there is only one individual in each degree of propinquity. Their respective collaterals (as described in sec. 41, with the substitution of "ascendant" for "intestate") form together the collateral ascendants of the intestate. In the ascending line the younger ascendant and his collaterals are nearer in propinquity than the elder ascendant and his collaterals. As between each ascendant and his collaterals, the former is nearer than the latter. Among collateral ascendants of each degree, their propinquity is subject to sec. 41, with the substitution of

“ascendant” for “intestate.” As regards the descendants of collateral ascendants, this section is subject to the rule of representation stated in sec. 43.

43. REPRESENTATION.—Children are, in the order set forth in sec. 40, entitled to the propinquity of their deceased parent, whether that is an original propinquity under secs. 40, 41, and 42, or the representative propinquity of a deceased child under this section. As regards posthumous children, see sec. 15.

44. ILLUSTRATIONS.—Where a descendant or a collateral, or a collateral ascendant who would have been the sole heir-at-law of the intestate had he or she survived, predeceases the intestate but leaves children, these children are entitled (in the order set out in secs. 40 and 43) to succeed to the intestate’s whole heritage. Where such predeceasing descendant or collateral, or collateral ascendant, would by survivance have become one of a number of heirs-portioners, her or his children succeed to the share of the succession that their mother or father would have taken by survivance. Thus in the first degree of representation, where a son succeeds, he succeeds to the whole share as representing his mother, and becomes an heir-portioner, sharing equally along with his aunts *per capita*; and if he also had predeceased the intestate leaving daughters only, such daughters would in the second degree of representation have succeeded as heirs-portioners *per stirpes* along with their grand aunts.

Heirs of Conquest.

45. The law *proprio vigore* gave effect to one variation from the principal line of succession in the case of conquest heritage or heritage which had been acquired

by the deceased on a singular title containing a destination to his heirs generally without specially calling his heirs of line, and to which the deceased had completed a feudal title. Where on such singular successor's death the succession had opened to male collaterals, it deviated from the principal line by preferring the elder before the younger brother. This was a departure from the principal line of succession out of favour to the law of primogeniture.⁵ It has now been abolished, and the principal line of succession to heritage is the only line of heirs-at-law.⁶

Heirs of Provision.

46. There are a number of lines of heirs recognised by law as existing within and limiting the principal line of heirs-at-law. A heritable estate may descend to such a conventional line of heirs when called in a destination contained in the investiture of the estate in question. The principal lines of heirs of provision are as follows:—

(1) *Heirs Male of A.*—A destination to A and his heirs male limits the order of succession to such of the line of A's heirs-at-law as are males and can trace their propinquity to A through males exclusively. It excludes such males as require to trace their propinquity through a female, and heirs-portioners have no place in this line of succession. On the failure of this line, the succession opens to the heirs-at-law of the last heir male of A.

(2) *Heirs Female of A.*—A destination to A and his heirs female occurring alone is not construed as a limitation of the legal order of succession. Heirs female are

⁵ Ersk. Inst. III., 8, 14.

⁶ Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 37; *Walker v. Walker's Trustees*, 1917 S.C. 46.

usually called after heirs male (as, *e.g.*, to A and his heirs male, whom failing, his heirs female) to indicate that on the failure of the line of heirs male the succession opens to those of the line of heirs-at-law who had been excluded by reason of being females or by reason of their descent through a female. On the failure of the line of heirs male of A, this destination prevents the succession opening to the heirs-at-law of the last heir male of A and takes it back to the line of the heirs-at-law of A himself.⁷

(3) *Heirs of the Body of A*.—This destination limits the legal order of succession to A by excluding his collaterals and ascendants. Where a fiar in this line has inherited through his mother and died without issue, the estate may descend to the mother's issue by another marriage, although such issue cannot be heirs-at-law of the last fiar because of the uterine relationship to him. On the exhaustion of this line of heirs, the succession opens to the heirs-at-law of the last heir of the body of A.

(4) *Heirs of the Marriage of A and B*.—This destination limits the order of succession to such of the heirs of the body of A as are also heirs of the body of B. On the exhaustion of this line of heirs, the succession opens to the heirs-at-law of the last heir of the marriage.

47. When technical language is employed to describe a line of heirs of provision in framing a destination of heritage, the Court will construe the destination so as to have as near as possible the ordinary limitative meaning.⁸ But the Court in construing such limitations where ambiguous⁹ will have regard to the intention of

⁷ *Dalrymple v. Hope*, 1739, 1 Pat.App. 237.

⁸ *Blair v. Lyon*, 1739, 5 Br. Supp. 663; Sandford on Entails, pp. 64 *et seq.*; *Sinclair v. Earl of Fife*, 1766 M. 14944; *Ker v. Innes*, 1810, 5 Pat.App. 320.

⁹ *Mackenzie v. Duke of Devonshire*, 1896, 23 R. (H.L.) 32.

the maker of the deed, so far as can be gathered from the context.¹ “Heirs male” may be construed from the context as meaning “heirs male of the body,”² and “heirs whatsoever” may be construed as meaning “heirs whatsoever of the body.”³ If the deed contains a special definition of the language used in the destination to heirs, that will be given effect to.⁴

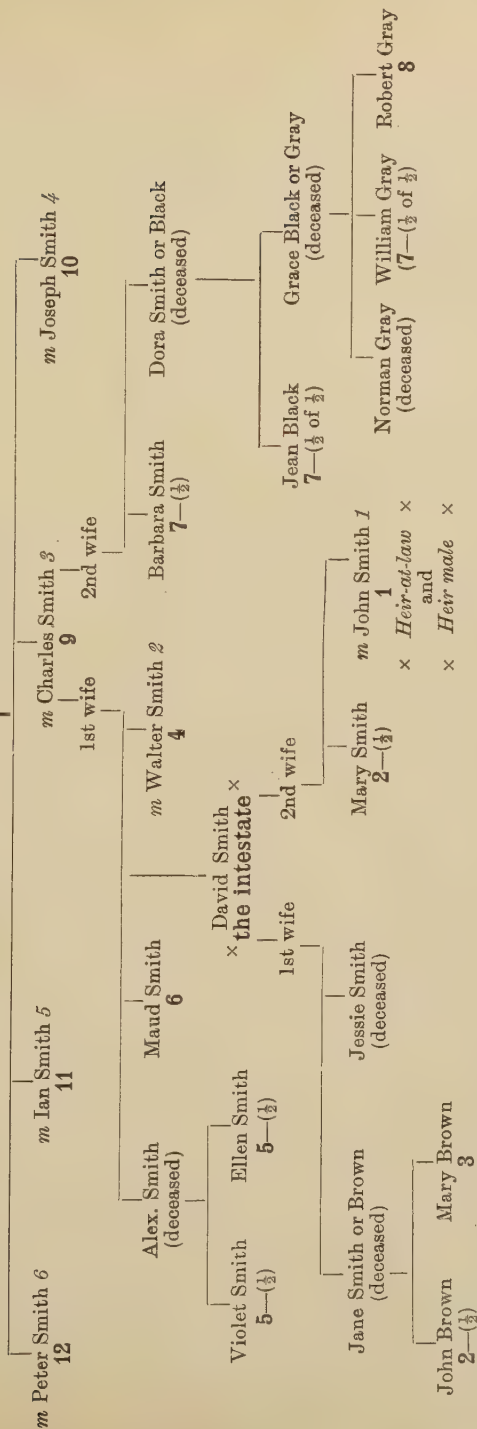
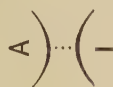
¹ *Gordon v. Gordon's Trustees*, 1882, 9 R. (H.L.) 101.

² *Leslie v. Leslie*, 1774, 6 Pat.App. 792.

³ *Earl of Northesk*, 1882, 10 R. 77.

⁴ *Campbell's Trustees v. Campbell*, 1838, 16 S. 1004; *Richardson v. Hay*, 1824, 2 Sh.App. 149.

TABLE SHOWING ORDER OF SUCCESSION TO DAVID SMITH, THE INTESTATE.



Deceased means predeceased the intestate.

Heavy-type figures indicate the order of heirs-at-law of David Smith, so that if 1 had predeceased him 2 would have been heirs-portioners, and if 2 had both predeceased him 3 would have been heir-at-law, and so on (but if John Smith and John Brown had both predeceased him Mary Brown and Mary Smith would have been heirs-portioners).

Fractions in brackets denote the *pro indiviso* share of heritage which would have been taken to heirs-portioners of the degree of propinquity indicated by the heavy-type figures prefixed.

Letter m in italics indicates the line of heirs male of David Smith, and the italicised figures indicate the order of succession in that line.

CHAPTER IV.

ADITIO HÆREDITATIS.

VESTING IN HEIRS, s. 48. | *PRÆCIPUA*, s. 56.

SERVICE OF HEIRS, s. 52. | *BENEFICIUM ORDINIS* AND RELIEF, s. 57.

Vesting in Heirs.

48. On the death of a person there vests in that kinsman nearest him in propinquity according to one or other of the lines of heir-at-law or heir of provision the character of heir in that line of succession.¹ As regards heirs of the legal order of succession, the character of heir then taken vests indefeasibly, subject to the explanation contained in sec. 15, with respect to uterine life. As regards the conventional lines of heirs, the character of heir taken at the death of the intestate is liable to be divested by the emergence of a nearer heir as explained in sec. 15. The term vesting, however, has come to be used in relation to the beneficial right taken by the heir in the property of his ancestor rather than to heirship. Allodial heritable estates vest in the heir at the date of the intestate's death by virtue of the common law, and the heir requires no writing or other procedure to complete his right to the allodial estate.² At common law feudal estates did not vest in the heir by the death of the intestate.

¹ *Stobie v. Smith*, 1921 S.C. 894.

² *Montgomerie Bell*, "Lectures on Conveyancing," 3rd edition, vol. ii., p. 1082; *Ersk. Inst.* III., 8, 77; *Beaton v. Gaudie*, 1832, 10 S. 286.

49. Prior to 1874 the feudal estates of an intestate formed as at his death a *hæreditas jacens*, and the person entitled to succeed to it was known as the apparent heir. The *hæreditas* did not vest on death *eo ipso* and without some act on the part of the apparent heir. The apparent heir might serve himself heir by a general service with the effect of taking his heirship out of the state of mere apparency and of vesting in himself a personal right to the succession, or, on the other hand, he might renounce the succession, and he could not be charged to enter as heir to his ancestor within the *annus deliberandi*.³ Where he did take up the *hæreditas jacens* by general service, he rendered himself liable for his ancestor's debts, even though these were in excess of the value of the *hæreditas*.⁴ But the Scots Act of 1695⁵ allowed the apparent heir to enter to his predecessor *cum beneficio inventarii* as use was in executories and moveables, and on this being done declared him to be only liable to his predecessor's debts and deeds to the extent of the value of the heritage given up in the inventory. The Service of Heirs Act, 1847,⁶ and the Titles to Land Consolidation Act, 1868,⁷ continued that facility. By the Conveyancing Act, 1874,⁸ a personal right to heritage now vests in the heir⁹ by survivorship without the necessity for service or any other procedure, and the heir is no longer liable for his ancestor's debts beyond the value of the estate to which he succeeds. But he may still renounce the succession.

³ Ersk. Inst. III., 8, 54-57; the *annus* being reduced to six months by the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 61.

⁴ Ersk. Inst. III., 8, 50.

⁵ 1695, cap. 24.

⁶ 10 & 11 Vict. cap. 47, sec. 25.

⁷ 32 & 33 Vict. cap. 101, secs. 47 and 49.

⁸ 37 & 38 Vict. cap. 94, secs. 9 and 12.

⁹ *M'Adam v. M'Adam*, 1879, 6 R. 1256. (Heir-at-law or heir of provision as the case may be.)

50. The personal right to an estate in land which vests in the heir by survivorship under the Conveyancing Act, 1874,¹ is defined to "be of the like nature and be attended with the like consequences and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance according to the existing law and practice." It is, accordingly, a mode of singular succession, and does not render the heir liable for the debts of his ancestor.²

51. The heir may, without entering as heir to his ancestor, possess the lands, and, if he does so, he incurs a passive liability for his ancestor's debts, but limited to the extent of his intromissions with the estate.³ On the expiry of six months from his ancestor's death he may be charged at the instance of his ancestor's creditors to enter as heir.⁴ The charge is made by the citation on and execution of a summons of constitution at their instance.⁵ If the heir then refuses to enter and renounces the succession, the ancestor's creditors may still adjudge the lands as a *hæreditas jacens*, notwithstanding that a personal right to the *hæreditas* had vested in the heir.⁶

Service of Heirs.

52. The *aditio hæreditas*, by which an heir-at-law or an heir of provision enters as heir to his ancestor and takes up the succession, is made by the process of service as heir in the Sheriff Court of Chancery or in the appropriate territorial Sheriff Court. The service may be either a general service or a special service. Whether

¹ 37 & 38 Vict. cap. 94, sec. 9.

² *Fenton Livingstone v. Crichton's Trustees*, 1908 S.C. 1208.

³ Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 12.

⁴ Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 61.

⁵ *Ibid.*, sec. 60.

⁶ Conveyancing Act, 1874, *supra*, sec. 12.

the heir enters as an heir-at-law or as an heir of provision, and whether he enters by general or by special service, his liability for his ancestor's debts is limited to the value of the estate of such ancestor to which he succeeds.⁷

53. General service is now only the mode by which an heir takes up his ancestor's heritable succession as a whole. The decree of general service vouches that the petitioner is the heir of a particular ancestor in a particular line of succession. The petition may in all cases be presented in the Sheriff Court of Chancery, but may also, in the petitioner's option, where the ancestor has at the time of his death his ordinary domicile in a county in Scotland, be presented in the territorial Sheriff Court of that county.⁸ In order to obtain a service as heir of the principal line of succession (*i.e.*, as heir-at-law), the petitioner requires to establish (1) the date of his ancestor's death, and (2) his own character as *hæres propinquior* of the principal line at that date. When the petitioner is not the eldest son of his ancestor, he must in establishing his own propinquity also exclude the existence of any nearer heir, as, *e.g.*, by establishing that the eldest son predeceased the ancestor without issue.⁹ In order to obtain a service as heir of a line of provision (as, *e.g.*, heir male) the petitioner requires to establish (1) the date of his ancestor's death, (2) that the particular line of heirs of provision are entitled to succeed under a specified deed, and (3) his own character as *hæres propinquior* in that line at that date. The fact of a particular line of heirs of provision being en-

⁷ Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 12.

⁸ Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 28.

⁹ *Stobie v. Smith*, 1921 S.C. 894.

titled to succeed can only be established by reference to a conventional destination to such heirs.¹

54. By special service the heir may take up specified portions of his ancestor's heritage. A petition for special service, whether in the character of heir-at-law or heir of provision, may be presented in the Sheriff Court of Chancery, or at the option of the petitioner in the Sheriff Court of the county where the lands are wholly situated.² Where the ancestor was infeft in the lands, the petition is presented under the Titles to Land Consolidation Act, 1868.³ Where the ancestor was not infeft the petition is presented under the Conveyancing Act, 1874.⁴

55. The modes whereby an heir who has taken up his ancestor's heritage by service may complete his title in feudal form are matters proper to the subject of conveyancing. The most usual method is by recording an extract decree of special service in the appropriate land register.

Præcipua.

56. Heirs-portioners in taking up their ancestor's succession become proprietors of each heritable estate in equal shares *pro indiviso*. The eldest heir-portioner in the legal line of succession has a preferable right to indivisible things as a *præcipuum*.⁵ A single feudal superiority thus falls to the eldest heir-portioner, but a number of separate superiorities would fall to be divided. The principal mansion-house does, but an ordinary

¹ Titles to Land Consolidation Act, 1868, *supra*, sec. 29.

² Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 28.

³ *Ibid.*, sec. 29.

⁴ 37 & 38 Vict. cap. 94, sec. 10.

⁵ Ersk. Inst. III., 8, 13.

country house does not fall to the eldest as *præcipuum*. While the garden and offices are included with the mansion-house as *præcipuum*, policies and other ornamental adjuncts are not.⁶

Beneficium Ordinis and Relief.

57. Under the Scots Act of 1503, as construed, the heir who has entered may be sued for any debt due by his ancestor.⁷ Where, however, the creditor elects to sue the heir rather than the executor, he must observe the proper order of heirs. With regard to debts not specially charged on any particular estate, and debts of which the executor is bound to relieve the heir, the heir-at-law must be discussed first.⁸ Heirs-portioners are each liable for the whole debt of their ancestor, but the creditor must discuss each heir-portioner before he can have recourse for her share of the debt against her co-heirs.⁹ After discussing heirs-at-law, it was thought by the Institutional writers that the creditor might then have recourse against the heirs of provision, beginning with heirs male, proceeding to heirs of tailzie, and thereafter to heirs of the marriage, each series being liable *subsidiarie* for the whole debt; but the view which now prevails is that after the heir-at-law the various heirs of provision are only liable for their ancestor's general debts rateably *secundum valorem* of the estates which they inherit.¹ In every case the liability of an heir is limited to the value of the benefit he takes from the succession.²

⁶ *Callander v. Harvey*, 1916 S.C. 420.

⁷ 1503, cap. 76, and cf. sec. 138, *infra*.

⁸ *Ersk. Inst.* III., 8, 52; *Park's Curator v. Black*, 1871, 9 M. 1078.

⁹ *Ersk. Inst.* III., 8, 53.

¹ *Mackenzie v. Mackenzie*, 1847, 9 D. 836.

² Cf. sec. 52, *supra*.

58. With regard to debts charged upon an inheritance destined to a particular series of heirs, these heirs ought first to be discussed,³ and, where any debt is charged upon a number of inheritances destined to different series of heirs, these heirs may all be sued in one action.⁴ As in a question with an heir subsidiarily liable for his ancestor's debt, the creditor, as a condition of suing him, is bound to give him the *beneficium ordinis* by first discussing the heirs primarily and priorily liable. Such discussion only becomes effective where the prior heirs (1) have renounced the succession, or (2) have been proceeded against by personal diligence and also by adjudication.⁵

59. Where an heir who is liable only *subsidiarie* has paid a heritable debt due by his ancestor, an action of relief lies at his instance against the heir primarily liable.⁶

³ *Ogilvie v. Dundas*, 1826, 2 W. & S. 214.

⁴ *Sinclair's Executors v. Hume*, 1798, Hume, 176.

⁵ Ersk. Inst. III., 8, 53.

⁶ Ersk. Inst. III., 8, 53; *Rose v. Rose*, 1787, 3 Pat.App. 66.

CHAPTER V.

BURDENS AFFECTING HÆREDITAS.

WIDOW'S £500, s. 61.

COURTESY, s. 65.

TERCE, s. 70.

LESSER TERCE, s. 78.

60. The debts of the ancestor which form part of, rather than a deduction from the *hæreditas* have been dealt with in Chapter IV. The *hæreditas* itself may be burdened by certain rights which arise *ex lege* on the death of the ancestor in favour of a surviving spouse. These burdens affect the *hæreditas* whether the heir enters or renounces the succession. Where he does enter, his right is subject to the burdens dealt with in this chapter, being (1) the widow's £500, (2) courtesy, (3) terce, and (4) lesser terce.

Widow's £500.

61. The Intestate Husband's Estate Act, 1911,¹ provides that in the case of a man dying intestate, domiciled in Scotland, leaving a widow but no lawful issue, his widow should be a creditor upon the *hæreditas* for £500. Where the intestate husband leaves both heritable and moveable estate, the charge of £500 is borne by the heritable estate *pro rata* in proportion to the net values of the heritable and moveable estates respectively.² Where the intestate's net heritable and moveable estate

¹ 1 & 2 Geo. V. cap. 10, secs. 1 and 2.

² *Ibid.*, sec. 3.

does not exceed £500, the whole belongs to the widow absolutely and exclusively.³

62. As the Act only applies to Scotland,⁴ the widow's £500, so far as forming a charge on heritage, is limited to heritage in Scotland, and it forms a charge on that heritage only where the intestate died domiciled in Scotland.⁵ As the widow's £500 is due only where the intestate leaves no lawful issue, it cannot compete with the right of succession of heirs in the descendant line, however remote.⁶ When the deceased has disposed by will of any part of his estate, heritable or moveable, the widow's right to £500 does not exist.⁷

63. A widow entitled to the statutory £500 may present an application to the Sheriff Court of the county in which her husband was domiciled at his death, or, where that county domicile is uncertain, to the Sheriff of the Lothians and Peebles at Edinburgh.⁸ Where the net value of the heritable and moveable estate does not exceed £500, the Court issues a decree on which the widow may make up a title to the heritage in her own right.⁹ Where the heir has made up his title to the heritage prior to the widow's application, the procedure in the Sheriff Court is ineffectual to give her a title, but she can adjudge the lands from the heir in implement of the implied statutory obligation upon him.¹ The appropriate action would be one of declarator and adjudi-

³ *Ibid.*, sec. 1.

⁴ 1 & 2 Geo. V. cap. 10, sec. 7.

⁵ *Ibid.*, sec. 1; Intestate Husband's Estate Act, 1919 (9 Geo. V. cap. 9), sec. 3 (3).

⁶ 1 & 2 Geo. V. cap. 10, sec. 1.

⁷ *Ibid.*, sec. 1; *Taylor's Executors v. Taylor*, 1918 S.C. 207. For the meaning of dying intestate, cf. secs. 8 *et seq.*, *supra*.

⁸ Intestate Husband's Estate Act, 1919 (9 Geo. V. cap. 9), sec. 1.

⁹ *Ibid.*, sec. 3 (1).

¹ Intestate Husband's Estate Act, 1911 (1 & 2 Geo. V. cap. 10), sec. 1.

cation in the Court of Session. Where in the widow's application to the Sheriff it appears that the net value of the heritable and moveable estate exceeds £500, the Sheriff issues a decree which enables the widow to complete a right in security for £500 over the heritable estate as at the date of her husband's death.²

64. Where the husband's net heritable and moveable estate exceeds £500, the widow's statutory right is given in addition and without prejudice to her right of terce in the same way as if the residue of the heritable and moveable estate after payment of the £500 had been the whole of the husband's heritable and moveable estate and she had had no right to £500.³ This proviso as to *modus* assumes that before the terce is struck there has been deducted from the capital value of the heritable estate falling to the heir a sum bearing to the sum of £500 the same proportion which the net capital value of the heritage bears to the net capital value of the whole heritable and moveable estate.⁴ Accordingly, the heir's right to heritage suffers a capital reduction in respect of a proportion of the widow's £500, and his right as so reduced remains subject to the widow's terce.

Courtesy.

65. Courtesy is the liferent servitude given by the custom of Scotland to the husband whereby he was continued in possession of his wife's heritable estate as at and after the dissolution of the marriage by her death or divorce in respect of his being the father of her heir-presumptive.⁵ Under the common law it extends to the

² Intestate Husband's Estate Act, 1919, *supra*, sec. 3 (2).

³ Intestate Husband's Estate Act, 1911 (1 & 2 Geo. V. cap. 10), sec. 4.

⁴ *Ibid.*, sec. 3.

⁵ Ersk. Inst. II., 9, 52.

wife's whole heritable estate which she had acquired by inheritance or during her ancestor's lifetime *preceptione hæreditatis*, but it excluded heritable estate which she had acquired by singular title, unless she was *alioqui successura*.⁶ The effect of the statute abolishing the distinction between heritage and conquest, however, was that after 1874 the right of courtesy attached also to the wife's heritage acquired on a singular title.⁷ It also attaches at common law to entailed lands unless expressly excluded, to burgage subjects, and to superiorities, and under statute since 1925 to lands held by trustees for behoof of the wife.⁸ In the case of a wife dying prior to 1st January, 1925, her infeftment in fee is at common law the measure of the right to courtesy, and such courtesy ranks before any of her personal creditors. In the case of a wife dying thereafter, her widower is under statute not entitled to claim courtesy in competition with a creditor of his wife and her infeftment is not the measure of courtesy, it being sufficient that she held on a personal title capable of being completed by infeftment or by being recorded in the appropriate Register of Sasines (including heritable estate to which her title might be completed as aforesaid held in trust for her behoof), and out of which, if her title had been so completed, her husband would have had a right to courtesy, and it being insufficient that she died infeft if she had absolutely disposed the heritable estate or part of it for an onerous consideration during her lifetime.⁹

66. As the servitude of courtesy was given to the husband in respect of being the father of his wife's heir-

⁶ Ersk. Inst. II., 9, 54; *Watt v. Wilkin*, 1855, 13 R. 218.

⁷ Conveyancing Act, 1874 (37 & 38 Vict. cap. 94), sec. 37; *Walker v. Walker's Trustees*, 1917 S.C. 46.

⁸ *Lord Clinton*, 1869, 8 M. 370; Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 21 (4).

⁹ Conveyancing Act, 1924, *supra*, sec. 21 (4).

presumptive, it is only where the wife bore a child to her surviving husband that the right to courtesy can arise.¹ It is not necessary that the child should survive and inherit, but it must have been born alive.² It seems also sufficient that the child should have been legitimated per *subsequens matrimonium*.³

67. If his wife has at the time of her death a surviving child by a former marriage who succeeds as her heir, her surviving husband has no right to courtesy. Where the wife is succeeded by heirs-portioners, being daughters of two marriages, it would appear that the surviving husband's right of courtesy cannot in principle extend to the whole of her heritable estate. In the event of such daughters by two marriages predeceasing their mother, the surviving husband in principle would be entitled to courtesy out of her whole heritage, at least in the case where the last surviving daughter was a child of the second marriage. Courtesy may be renounced by the husband in his antenuptial or post-nuptial contract of marriage. The right, however, is not excluded by a conventional provision in favour of the husband, unless that is given subject to a declaration that it is in lieu of courtesy.⁴

68. As courtesy is a benefit accruing at common law through the marriage, it would appear in principle at common law that a husband divorced either on the ground of adultery or desertion loses his right of courtesy in his wife's estate, and that where the wife is divorced on either ground her husband becomes entitled to courtesy as at the date of the divorce, provided the other

¹ Ersk. Inst. II., 9, 53.

² *Roberton v. Moderator of General Assembly*, 1833, 11 S. 297 (meaning of born alive).

³ *Crawfurd's Trustees v. Hart*, 1802, M. 12,698.

⁴ *Hamilton v. Boswell*, 1720, Rob. 192 and 346.

requisites of courtesy above described are present.⁵ It would appear also that in principle at common law the effect of both spouses being divorced in conjoined actions is forfeiture of courtesy.⁶ The Conveyancing Act, 1924, provides that in the section defining the nature of the heritage to be attached by courtesy "widower" shall include a man who has obtained a decree of divorce against his wife.⁷ Applying this interpretation to sec. 21 (4) literally, it would appear to read so as to give the divorcing husband a right of courtesy in his wife's estate, whether he himself had been divorced or not, and in either event not until the death of the wife. As, however, the statute is not purporting to constitute a new right, but only to define the extent of the property attached by a common law right, the section would not be interpreted either as conferring on a divorced husband a right to courtesy, or as postponing until the date of her death the courtesy due to a husband on the divorce of his wife.

69. As *jure mariti* the husband was formerly in possession of the fruits of his wife's heritable estate *stante matrimonio*, he on her death, merely continued that possession under another name, and, now that the *jus mariti* has been abolished,⁸ the courtesy remains as a legal servitude without infeftment. It may, however, now be redeemed at the option of persons interested in the servient tenement on payment of a capital sum, and the tenement may be disburdened.⁹

⁵ Stair Inst. I., 4, 20, and 21.

⁶ Cf. *Fraser v. Walker*, 1872, 10 M. 837.

⁷ 14 & 15 Geo. V. cap. 27, sec. 21 (5).

⁸ Married Women's Property Act, 1881 (44 & 45 Vict. cap. 21), sec. 2.

⁹ Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), secs. 21 (3) (d) and (e) and 21 (9).

Terce.

70. Terce is the liferent servitude given as a legal marriage provision to the wife whereby, on the dissolution of the marriage by her husband's death or divorce, she becomes entitled to one-third of the annual fruits of his heritable estate in respect of her marriage having endured for a year and a day or of her having borne a child of it. The terce attaches to the husband's heritable estate whether it was by him acquired by universal or by singular title.¹ From its computation, however, are excluded rights of superiority, rights of reversion, rights of patronage, profits derived from minerals, and the seat of the mansion-house.²

71. The condition on which terce was given at common law was that the marriage had subsisted for a year and a day, or that a child had been born of it.³ Some textwriters have taken the view that this condition has been taken away by sec. 7 of the Intestate Moveable Succession Act, 1855.⁴ Other textwriters have taken the view that, as the statute is dealing with moveable succession, it does not apply so as to affect the constitution of legal servitudes on heritage.⁵

72. The view of construction of the Intestate Moveable Succession Act, 1855,⁶ adopted here is that, as there is nothing in sec. 7 expressly applying to heritable rights, its construction must be controlled by the general con-

¹ Ersk. Inst. II., 9, 44 and 49. (It is also due from burgage tenure under 24 & 25 Vict. cap. 86, sec. 12.)

² *Constable's Trustees v. Constable*, 1904, 6 F. 826.

³ Ersk. Inst. II., 9, 51.

⁴ M'Laren, "Wills and Succession," 3rd edition, sec. 158. Fraser, "Husband and Wife," 2nd edition, vol. ii., p. 1083.

⁵ Montgomerie Bell, "Lectures on Conveyancing," 3rd edition, vol. ii., p. 854. Cameron, "Intestate Succession," 2nd edition, p. 252.

⁶ 18 & 19 Vict. cap. 23.

text, and particularly by sec. 6, so as to confine its operation to the regulation of the goods in communion with a view to moveable succession generally, consequent on the death of either spouse. Accordingly, the law still stands as laid down by Erskine, that the widow's right to terce only arises where the marriage has endured for a year and a day, or where a child has been born of it.

73. In the absence of a judicial construction of secs. 6 and 7 of the Intestate Moveable Succession Act, 1855, it may be permissible to elaborate the point. The statute, as its long title sets forth, is an "Act to alter "in certain respects the law of intestate moveable succession in Scotland." It does not, therefore, *prima facie* purport to alter rights which are other than (1) rights of succession, and (2) rights to moveables. To neither of these categories does a right of terce properly belong, it being (1) a right constituted in favour of a singular successor on the dissolution of a marriage, not necessarily a dissolution by death; and (2) a legal servitude forming a burden on heritable estate. Secs. 1 to 5, inclusive, and secs. 8 and 9 of the Act confine their operative provisions to succession to moveables. The only remaining sections are 6 and 7. Sec. 6 postulates the case of a wife predeceasing her husband, and enacts that the representatives of such wife, whether she be testate or intestate, shall have no right to share in the goods in communion, *i.e.*, in the husband's moveable estate. This section, therefore, is dealing with the moveable succession to a deceased wife, but, inasmuch as it deals only with her share of the goods in communion, it is not exhaustive of its postulate which was a wife predeceasing her husband at whatever time, and therefore included the case where the marriage might be dissolved within a year and a day. In the case of a marriage so dissolved, what the law gave the wife's repre-

sentatives was not a share of goods in communion, but under it matters returned to the condition in which they stood before marriage, the whole tocher, if any, returning to the wife, and, if none, she having no share. In the result, therefore, the enactment of sec. 6 was inapplicable to this part of the section's postulate, unless dissolution within year and day were assimilated in its resultants to dissolution after year and day. In order to bring about this assimilation another section, sec. 7, was introduced, framed in very wide terms. In point of fact it assimilates a short marriage to a long marriage, whether the dissolution be by the death of the wife or of the husband, and the first-mentioned set of textwriters argue that, as sec. 7, by including the case of dissolution by the predecease of the husband, went beyond the rectifying of sec. 6, some meaning must be given to its enactment that, in the case where the husband is the predeceaser, the whole rights of the survivor and of the representatives of the predeceaser shall be the same in a short marriage as in a long one. It would seem, however, that that meaning is adequately given to it by saying that it prevents the return of matters to the condition in which they stood before marriage in the case in which the marriage was dissolved within year and day by the death of the husband, as well as in the case where it was dissolved within year and day by the death of the wife. In other words, it was necessary, in order to deal logically and exhaustively with the position of the goods in communion—succession to a share of which was the subject of the enactment of sec. 6—that sec. 7 should envisage the case of dissolution by the death of the husband, as well as by the death of the wife.

74. In the case of a husband dying prior to 1st January, 1925, his infestment in fee is the measure of his wife's right to terce, and such terce ranks before any of

his personal creditors.⁷ In the case of a husband dying thereafter, his widow is not entitled to claim terce in competition with a creditor of her husband, and his infetment is not the measure of the right to terce, it being sufficient that he held on a personal title capable of being completed by infetment or by being recorded in the appropriate Register of Sasines (including heritable estate to which his title might be completed as aforesaid held in trust for his behoof), and out of which, if his title had been so completed, his widow would have had a right of terce, and it being insufficient that he died infet if he had absolutely disposed his heritable estate or part of it for an onerous consideration during his lifetime.⁸

75. While a right to terce vested as a legal servitude without infetment, the tercer required, in order to enforce her right, to complete a title by service which enabled her to possess the heritage *pro indiviso* with the proprietor, or by kenning, which latter process allotted to her sole possession a particular parcel of the heritage. It seems doubtful whether service to the terce was ever necessary in order to transmit to the widow's executor a right to claim arrears.⁹ These processes of service and of cognition or kenning to terce have both been abolished, and in their place there have been substituted two actions of declarator, in the first of which the Court may declare that the widow has a right to terce out of specified items of the estate, and in the second of which the Court may declare the annual amount of her right to terce. The terce may be redeemed at the instance of persons

⁷ *Roxburgh's Trustees v. Roxburgh*, 1888, 16 R. 157; *Black's Trustees v. Scott*, 1895, 3 S.L.T. 8.

⁸ Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 21 (4).

⁹ *Pringle's Executrices*, 1870, 8 M. 622; *Edward v. Cheyne*, 1888, 15 R. (H.L.) 33.

interested in the burdened tenement by payment of a capital sum either in the course of the second action of declarator or in a separate action, and the heritage may be disburdened of the servitude of terce.¹

76. The terce was originally given as a legal marriage provision in view of the contingency that no other provision might have been made for the wife, and so, where the husband has conventionally provided for his wife in his marriage contract, that provision is by statute presumed to be in satisfaction of terce, unless it is expressed to the contrary.²

77. As terce is a common law marriage provision, it is forfeited by the wife being divorced, and it vests in the wife by and upon the dissolution of the marriage through her husband being divorced, as well as through his death.³ In principle, however, terce is forfeited where both spouses are divorced in conjoined actions.⁴ The Conveyancing Act, 1924, by sec. 21, provides that for the purpose of its enactment relating to terce "widow" includes a woman who has obtained a decree of divorce against her husband.⁵

Lesser Terce.

78. Lesser terce has all the qualities and qualifications of terce, except that it is due out of heritage already charged with a subsisting terce. Its amount is accord-

¹ Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 21.

² 1681, cap. 10; *Craik v. Penny*, 1891, 19 R. 339; *Douglas v. Douglas*, 1906, 13 S.L.T. 749; *Moss's Trustees v. Moss*, 1916, 2 S.L.T. 31.

³ *Stair Inst. I.*, 4, 20; *Ersk. Inst. II.*, 9, 51; *Thom v. Thom*, 1852, 14 D. 861.

⁴ Cf. *Fraser v. Walker*, 1872, 10 M. 837; *Manderson v. Sutherland*, 1899, 1 F. 621.

⁵ 14 & 15 Geo. V. cap. 27. Cf. sec. 68, *supra*.

ingly restricted to a liferent of one-third of the fruits of the lands under deduction of the prior charge or charges of terce. But when the prior charge flies off, as, *e.g.*, on the death of the elder widow, the lesser terce increases to one-third of the fruits of the terceable heritage, without deduction in respect of that prior terce.⁶

⁶ Ersk. Inst. II., 9, 47; Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 21 (3) (c).

CHAPTER VI.

MOVEABLE SUCCESSION.

MOVEABLES, s. 79.

NEXT-OF-KIN, s. 83.

FREE MOVEABLE ESTATE, s. 82.

HEIRS IN *MOBILIBUS*, s. 84.

Moveables.

79. The municipal law of Scotland regards as being moveable all proprietary rights which bear no resemblance to feudal rights or to rights having a tract of future time.¹ Thus furniture, animals, money, *jura crediti*, and similar rights are reckoned moveable in succession. Select articles of furniture and farm stock, which at one time were regarded as accessory to heritage and passed to the heir as heirship moveables, are now moveable in succession.² Bonds and dispositions in security are also now moveable as regards the succession of the creditor, but remain heritable *quoad legitim* and *jus relictæ*.³ Personal bonds, whether the term of repayment be yet to come or bygone, are also moveable not only in the creditor's succession, but also *quoad legitim* and *jus relictæ*.⁴ Scots law, however, also recognises the rule of international law, stated in sec. 24, *supra*, that the character of a right as moveable or immoveable falls to

¹ Ersk. Inst. II., 2, 7-14.

² Titles to Land Consolidation Act, 1868 (31 & 32 Vict. cap. 101), sec. 160.

³ *Ibid.*, sec. 117

⁴ 1661, cap. 32; Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 22.

be determined by the law of its *situs*. Thus, an English mortgage over land is moveable because it is so classed in English law.⁵ Whenever, therefore, a right is moveable by the law of its *situs*, it is, in the succession to a domiciled Scotsman, treated as moveable.

80. Certain moveable rights are purely personal and evanescent, so that they may be said *mori cum persona*. Contractual rights which contain the element of *delectus personæ* may not pass in the succession at all.⁶ The right to raise an action of damages for personal injury may not pass in the succession,⁷ but if a claim of damages had been intimated by the deceased, the right to raise an action to enforce it will pass in his succession.⁸ It is only rights which were *in bonis* of the deceased that pass in his moveable succession.⁹

81. Where a right to the fee of moveables has been taken by an intestate under a *mortis causa* deed containing an ulterior destination in the event of his death, the presumption of construction is against a substitution of heirs to take in succession to him, although a substitution in moveables is not a legal impossibility.¹ The effect of special destinations inserted by the deceased in his investments in moveables is in practice confined to regulating their disposal on his own death, and such destinations, therefore, possess the character of the testament of an individual rather than the character of a destination of property to a series of heirs of provision.²

⁵ *Monteith v. Monteith's Trustees*, 1882, 9 R. 982. Cf. *Moss's Trustees v. Moss*, 1916, 2 S.L.T. 31.

⁶ *Lawson's Trustees v. Cesari's Trustees*, 1901, 9 S.L.T. 355.

⁷ *Bern's Executor v. Montrose Asylum*, 1893, 20 R. 859.

⁸ *Leigh's Executor v. Caledonian Railway Co.*, 1913 S.C. 838.

⁹ *Millar v. Birrell*, 1876, 4 R. 87.

¹ *Crompton's Judicial Factor v. Barnardo's Homes*, 1917 S.C. 713.

² *Dennis v. Aitchison*, 1924 S.C. (H.L.) 128. Cf. sec. 11, *supra*.

Free Moveable Estate.

82. Moveable succession is essentially a succession to fungibles in which the moveable rights and obligations of the deceased are added together in terms of money, and the result is the somewhat elastic conception of a free moveable estate. When a person dies domiciled in Scotland and intestate, his free moveable estate is distributable at common law equally among his next-of-kin as a class who are at common law the persons entitled to the office of executor. The right of the next-of-kin to share in the division of the free moveable estate, though not their primary right to the office of executor, has been modified by statutes³ to the effect that such estate is now distributable among a larger class, which has come to be known as the heirs *in mobilibus ab intestato*. Where the intestate is survived by spouse and children, the legal rights of *jus relictæ* or *jus relictæ*, as the case may be, and of legitim, vest in the spouse and children respectively, each of these rights being in the nature of a further debt due by the executor out of the debtor and creditor balance known as the free moveable estate, and not a right of intestate succession. Where both spouse and children survive, the intestate's free moveable estate suffers a tripartite division, one-third being dead's part, one third legitim, and one-third *jus relictæ* or *jus relictæ*. Where either spouse or children survive, but not both, the division is bipartite, one-half being dead's part and one-half legitim or *jus relictæ* or *jus relictæ*, as the case may be. Where neither spouse nor children survive, the whole is dead's part. The dead's part is the only portion of the estate which can be disposed of by will, and *e converso*, it is the only

³ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23); Intestate Moveable Succession Act, 1919 (9 & 10 Geo. V. cap. 61).

portion of the estate that is affected by the absence of a will. In the sense of the Intestate Moveable Succession Acts,³ the dead's part is the free moveable estate.

Next-of-Kin.

83. The next-of-kin of an intestate are ascertained according to the same general rules of precedence of propinquity as is the heir-at-law (cf. secs. 38-42), except that (1) the preference of males before females, (2) the law of primogeniture, and (3) the doctrine of representation, do not apply. The descendants of the intestate are nearer of kin than his collaterals; his collaterals are nearer of kin than his lineal ascendants; and his lineal ascendant in each degree is nearer of kin than the collateral ascendants of that degree. Among collaterals kinship by the full blood or by the half-blood consanguinean alone is reckoned, and among ascendants no kinship is reckoned through mothers. All persons in the nearest surviving degree of kinship to the intestate at the time of his death form as a class his next-of-kin irrespective of sex or relative age, and, as there is at common law no representation in moveables, they exclude the descendants of predeceasing members of their class from the category of next-of-kin. As, however, the next-of-kin are no longer entitled to succeed as such, the definition of the class is important only (1) as forming the basis for reckoning the heirs *in mobilibus ab intestato*, and (2) in competitions for the office of executor.

Heirs *in Mobilibus*.

84. The heirs *in mobilibus* form the class of persons who by virtue of their kinship to the intestate are en-

³ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23); Intestate Moveable Succession Act, 1919 (9 & 10 Geo. V. cap. 61).

titled under the statutes⁴ and the common law to share in the free moveable estate of which the intestate might have disposed by will. The statutes⁴ have extended the class formerly entitled at common law to succeed *ab intestato* as next-of-kin (1) by admitting the doctrine of representation in favour of the issue of predeceasing next-of-kin not being more remote than brothers and sisters of the intestate; (2) by admitting the father, whom failing, the mother, of the intestate to share to the extent of one-half of the free moveable estate in preference to brothers and sisters by the full blood or the half-blood consanguinean; (3) by admitting the mother to succeed to the whole next after the father and in preference to his collaterals; and (4) by admitting brothers and sisters uterine to succeed to the extent of one-half of the free moveable estate next after the father and mother, and in preference to collaterals of the intestate's father and more remote next-of-kin. The extent of the class of heirs *in mobilibus* entitled to share in the free moveable estate is liable to be affected where the deceased has left a mixed heritable and moveable estate, in respect that the heir-at-law is not entitled to participate in the division of moveables without collating heritage, but for the purpose of the present title it is necessary to limit the discussion to those cases where the deceased has left moveable estate only. The subject of collation *inter hæredes* is discussed at sec. 141 *et seq.*, *infra*.

85. DESCENDANTS.—The descendants of the intestate are entitled to succeed to the intestate's free moveable estate to the exclusion of collaterals and ascendants. At common law the child or children of the intestate

⁴ Intestate Moveable Succession Act, 1885 (18 & 19 Vict. cap. 23); Intestate Moveable Succession Act, 1919 (9 & 10 Geo. V. cap. 61).

were entitled to share equally among them as next-of-kin to the exclusion of the issue of his predeceasing children; and where the intestate was predeceased by all his children, his grandchildren were entitled to share equally among them as next-of-kin to the exclusion of the issue of predeceasing grandchildren, and so on, the nearer in degree excluding the more remote descendants, and the division being always *per capita*. Under the statute⁵ the lawful child or children of any descendant predeceasing the intestate, and who but for such predecease would have been one of the next-of-kin of the intestate, now come in the place of such descendant; and the issue of any such child or children, or of any descendant of such child or children who may have predeceased the intestate, now come in place of their predeceasing parent, and succeed to the share to which the parent would by survivorship have become entitled. The effect of the statute has thus been to introduce the doctrine of representation in moveable succession to its fullest extent among descendants.

86. The division of the free moveable estate among the descendants of the intestate is based not necessarily on the number of individuals succeeding as heirs *in mobilibus*, but on the number of members of the class of next-of-kin who have either survived personally or by their issue. Where an intestate is survived by a daughter and by three grandchildren by a predeceasing son, the division is into two equal shares, the daughter taking one share and the three grandchildren dividing the second share equally among themselves. In the case figured, if the daughter has also predeceased leaving two grandchildren, then the division is into five equal shares

⁵ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 1.

according to the number of grandchildren, who in default of children form the class of surviving next-of-kin, and take not by representation but in their own right.⁶ In the case of the five grandchildren the division is *per capita*, but in cases such as that instanced of the surviving daughter and the three grandchildren of the predeceasing son the division is always *per stirpes*, according to the number of members of the surviving class of next-of-kin, as well those who take by stirpital survivance as those who take by personal survivance.

87. COLLATERALS.—Failing descendants, the intestate's brothers and sisters by the full blood form the class of next-of-kin to the exclusion of descendants of predeceasing brothers and sisters, and, failing brothers and sisters of the full blood, the children of predeceasing brothers and sisters of the full blood form the next-of-kin to the exclusion of the descendants of predeceasing children of such brothers and sisters, and so on. Failing brothers and sisters of the full blood and their descendants, brothers and sisters consanguinean are next-of-kin, and, failing them, their children, and so on. At common law the collaterals forming the intestate's next-of-kin were entitled to succeed equally, to the exclusion of ascendants. Under the Intestate Moveable Succession Acts the right of succession of collaterals has been affected by the doctrine of representation which entitles the issue of a predeceasing next-of-kin to come in place of their parent, as explained in sec. 86, and also by a limitation of the right of collaterals and their descendants where the intestate is survived by his father or his mother. The doctrine of representation in collateral succession as in the succession of descendants only operates so as to bring about a *per stirpes* division where some only of the col-

⁶ *Turner v. Couper*, 1869, 8 M. 222.

lateral next-of-kin have predeceased living issue, and so where the intestate is survived only by nephews and nieces as his sole next-of-kin the division is *per capita*.⁷ The doctrine applies in favour of the descendants of predeceasing brothers and sisters consanguinean as well as in favour of the descendants of predeceasing brothers and sisters of the full blood, and it applies in favour of all such descendants, whether children or remoter issue whose lineal ascendants have failed.⁸ Where the intestate is survived by his father or mother, the right of collaterals and their descendants is limited to a one-half share of the free moveable estate.⁹

88. FATHER AND MOTHER.—At common law the father is one of the next-of-kin and ranks, and was entitled to succeed as such, next after collaterals and to the exclusion of ascendant collaterals. Under the statute¹ he is entitled to succeed to a one-half share of moveables in preference to collaterals of the intestate. Where collaterals have failed, the father, as next-of-kin, is still entitled to the whole moveable succession. At common law the mother is not one of the next-of-kin. Under the statute² in successions opening between 25th May, 1855, and 19th August, 1919, the mother was entitled to one-third of the moveable estate of an intestate dying without leaving issue and predeceased by his father in preference to collaterals. She could not take more than one-third, and, failing other heirs *in mobilibus*, the remainder fell to the Crown as *ultimus hæres*. Since 19th August, 1919,³ the mother represents the predeceasing

⁷ *Turner v. Couper*, 1869, 8 M. 222.

⁸ *Finlayson's Executor v. Hastie*, 1916, 1 S.L.T. 123.

⁹ Intestate Moveable Succession Act, 1855, sec. 3; Intestate Moveable Succession Act, 1919, sec. 1.

¹ Intestate Moveable Succession Act, 1855, sec. 3.

² Intestate Moveable Succession Act, 1855, sec. 4.

³ Intestate Moveable Succession Act, 1919, sec. 1.

father, and, failing the father, she now succeeds to one-half of the moveables in preference to collaterals, and to the whole moveable estate failing collaterals. She thus excludes collateral ascendants from the succession.

89. BROTHERS AND SISTERS UTERINE.—At common law brothers and sisters uterine of the intestate are not reckoned as his next-of-kin, and they have no right of succession as such. Their right of succession is purely a statutory one, and it is a right in all circumstances limited to a one-half share of the moveable estate, so that, if no other class of heirs *in mobilibus* survives, the other half will go to the Crown as *ultimus hæres*. In point of order they are preferred to the succession next after the father and mother and before collateral ascendants. As the uterines are not in any case next-of-kin, the substantive provision⁴ introducing representation in moveables is not applicable to their class, and their whole right depends on one section of the statute. Under this section,⁵ where the intestate “shall leave brothers
“and sisters uterine or any descendant of a brother or
“sister uterine, such brothers and sisters uterine and
“such descendants in place of their predeceasing parent
“shall have right to one-half of his moveable estate.” The effect of the section is to admit the doctrine of representation whereby children come in right of their predeceasing parent, whether that right is an original one or a right of representation. But when uterine collaterals of the first degree have predeceased leaving children only, it would appear that the division is not *per capita* according to the number of such children (as it would be under the rule of *Turner v. Couper*⁶ in the case of descendants who are next-of-kin), but it is

⁴ Intestate Moveable Succession Act, 1855, sec. 1.

⁵ *Ibid.*, sec. 5.

⁶ *Turner v. Couper*, 1869, 8 M. 222.

always a division *per stirpes* according to the number of brothers and sisters uterine who have left descendants.

90. ASCENDANTS.—The ascendant lines of propinquity from and including the collaterals of the intestate's father, and the lineal ascendants of the intestate's father with their respective collaterals, are unaffected by statute law, and they succeed *per capita* in their order as next-of-kin. Thus, where cousins-german form the class of surviving next-of-kin, the descendants of predeceasing cousins-german are excluded from the succession.⁷ Also the children of the paternal grandfather's collaterals are nearer of kin than, and are entitled to succeed to the exclusion of, the grandchildren of the same collaterals, there being no representation in moveables at common law.⁸

⁷ *Ormiston v. Broad*, 1862, 1 M. 10.

⁸ *Macmillan v. Macmillan*, 1909, 1 S.L.T. 35.

CHAPTER VII.

ADITIO IN MOVEABLE SUCCESSION.

VESTING OF RIGHTS OF SUC-
CESSION, s. 91.

EXECUTORS-DATIVE, s. 94.

CONFIRMATION, s. 98.

ADMINISTRATION AND DISTRI-
BUTION, s. 99.

Vesting of Rights of Succession.

91. At common law prior to 1823 the class of next-of-kin surviving at the date of the intestate's death were invested with the right to take up the moveable succession by process in the Commissary Court of Scotland. The procedure by which the succession was taken up was twofold, and it involved (1) the ascertainment of kinship as at the date of the intestate's death, which ascertainment took place in an application for an edict of executry from the commissary and was followed by a decree-dative entitling one or more next-of-kin to confirmation as executor-dative; and (2) the giving up by the executor-dative of an inventory of the intestate's moveable estate to the commissary, which was followed by a confirmation entitling the executor-dative to ingather the moveable estate contained in the testament-dative issued by the commissary. It was the second step of the procedure, viz., the confirmation, which vested the moveable estate as a whole in the executor. Where an executor died after appointment as executor-dative, but before confirmation, his representatives took no part of that executry, the executor's *aditio* not having been completed.¹ In

¹ Ersk. Inst. III., 9, 30.

1823 it was enacted that, “ in all cases of intestate succession where any person or persons who at the period of the death of the intestate, being next-of-kin, shall die before confirmation be expedite, the right of such next-of-kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives in the same manner as confirmation might have been granted to such next-of-kin immediately upon the death of such intestate.”² The effect of this enactment is that the moveable succession of an intestate now vests *eo ipso* on his death.

92. The heirs *in mobilibus* entitled to succeed to the moveable estate of the intestate are not by reason only of the vesting of a beneficial right in them *a morte* liable for the debts of the intestate. But any person, whether an heir *in mobilibus* or a stranger, who takes possession of the deceased's moveables without warrant or order of law becomes liable for the debts of the deceased as a vitious intromitter.³ It is, however, not enough to set up vitious intromission that the intromitter had not confirmed, it being also necessary to show that the moveables intromitted with were truly *in bonis* of the deceased.⁴ When an action was pending against the deceased at the time of his death, the pursuer may charge his heirs *in mobilibus* to confirm as executors, and, failing their either doing so or renouncing the succession they become liable to the pursuer as vitious intromitters.⁵ In all other cases it is in the option of the heirs *in mobilibus* to take up the succession by confirmation as executors or to leave it alone.

² 4 Geo. IV. cap. 98, sec. 1.

³ Ersk. Inst. III., 9, 49 *et seq.*

⁴ *Greig v. Christie*, 1908 S.C. 370.

⁵ 1695, cap. 41; *Davidson v. Clark*, 1867, 6 M. 151.

93. Where on the death of an intestate his relations entitled to succeed *ab intestato* cannot be traced, the proper course is the appointment of a judicial factor on his intestate estate, on the petition of the deceased's law agent or factor.⁶ Where the persons entitled to succeed do not proceed to confirmation, any creditor of the deceased, or any person having interest in the succession, may apply for the appointment of a factor under the Bankruptcy Act, 1913.⁷ Any creditor with a liquid document of debt may apply for his own appointment as executor-dative *qua* creditor, and may confirm sufficient of the deceased's estate to satisfy his debt.⁸ Sequestration of the deceased's estate may be awarded on the petition of a creditor or creditors for £50 liquid or illiquid, but not contingent, at any time if the deceased was notour bankrupt or if his successors concur or have renounced the succession, and on the expiry of six months from the deceased's death, whether or not he was notour bankrupt and whether or not his successors concur or have renounced the succession.⁹

Executor-dative.

94. An application for appointment as executor-dative is the first step towards taking up the moveable succession, and is now made by petition to the commissary of the county where the intestate died domiciled, or, when he had no fixed domicile in a county in Scotland, to the commissary of Edinburgh.¹ The persons entitled to apply for appointment are the next-of-kin and the

⁶ *Handyside v. Lord Advocate*, 1909, 1 S.L.T. 268; *Murray v. Lord Advocate*, 1916, 1 S.L.T. 369.

⁷ 3 & 4 Geo. V. cap. 20, sec. 163; *Bathgate v. Kelly*, 1926 S.N. 3.

⁸ 1695, cap. 41; 4 Geo. IV. cap. 98, sec. 4; *Stiven v. Myer*, 1868, 6 M. 370; *Whiffin v. Lees*, 1872, 10 M. 797.

⁹ Bankruptcy Act, 1913 (3 & 4 Geo. V. cap. 20), sec. 13.

¹ Confirmation of Executors Act, 1858 (21 & 22 Vict. cap. 56), secs. 2, 3, and 4.

creditors of the intestate;² the representatives of one of the next-of-kin who survived the intestate but predeceased the date of the application;³ and the statutory heirs *in mobilibus*.⁴ Where there are competing applications for the office, the precedence of rights falls to be determined by the commissary. When an intestate leaves estate not exceeding £500, his next-of-kin may apply to the commissary clerk direct for confirmation as executor-dative under the Intestates' Widows and Children Act, 1875, without the necessity for first obtaining an appointment as executor-dative.⁵

95. The next-of-kin have a preferable right to the office of executor-dative at common law. When more than one of the next-of-kin apply, they will be appointed as joint executors. The representatives of one of the next-of-kin who survived the intestate but died before confirmation are entitled to be appointed executors-dative jointly with the remaining next-of-kin.⁶ Where the collateral next-of-kin are entitled to succeed only to a one-half share of the free moveable estate by reason of the father or mother surviving the intestate, the father or mother and the representatives of the next-of-kin who survived the intestate but predeceased the date of confirmation, are entitled to be appointed to the office jointly with the next-of-kin.⁷ Where the succession opens to a class composed of next-of-kin and the issue of predeceasing members of that class, such issue suc-

² Cf. Instructions to the Commissaries of 1666, published in Acts of Sederunt, 1553 to 1790, at p. 95.

³ 4 Geo. IV. cap. 98, sec. 1.

⁴ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 1.

⁵ 38 & 39 Vict. cap. 41, amended by the Customs and Inland Revenue Act, 1881 (44 Vict. cap. 12), sec. 34, and the Finance Act, 1894 (57 & 58 Vict. cap. 30), secs. 16 and 23 (7).

⁶ *Mann v. Thomas*, 1830, 8 S. 468.

⁷ *Webster v. Shireess*, 1878, 6 R. 102.

ceeding as heirs *in mobilibus* by virtue of the doctrine of representation are not entitled to the office of executor-dative in competition with the surviving next-of-kin.⁸ A surviving spouse is not entitled to the office in competition with the surviving next-of-kin.⁹

96. When none of the next-of-kin, or of the representatives of next-of-kin who survived the intestate, applies for the office of executor-dative, the heirs *in mobilibus* succeeding under the Intestate Moveable Succession Act, 1855, are entitled to the office,¹ and the surviving spouse is also entitled to the office *qua* creditor.² Where there is a competition between the statutory heirs *in mobilibus* and the surviving spouse, they will be appointed joint executors, neither claim being preferable to the other, and there being no incompetency in making a joint appointment where one claims the office by virtue of a statutory right of succession and the other claims as a creditor for legal rights.³

97. A decree-dative is not invalid because it inaccurately bears to be *qua* next-of-kin, provided the person appointed was entitled to the appointment as one of the heirs *in mobilibus ab intestato*.⁴ An enemy alien is not now disentitled to the office of executor-dative.⁵ Where the next-of-kin are in pupillarity or incapable of acting, their nearest relative, or their curator, or other factor on their behalf, may obtain the appointment in his

⁸ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 1.

⁹ *Stewart v. Kerr*, 1890, 17 R. 707; *Campbell v. Falconer*, 1892, 19 R. 563; *Inglis v. Inglis*, 1869, 7 M. 435.

¹ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 1.

² *Inglis v. Inglis*, 1869, 7 M. 435, at p. 438.

³ *Muir, Petitioner*, 1876, 4 R. 74.

⁴ *Dowie v. Barclay*, 1871, 9 M. 726.

⁵ *Schulze*, 1917 S.C. 400.

own favour *qua curator* or factor.⁶ When decree-dative has been issued and extracted, but before confirmation, it is competent for the commissary to entertain an application by another person to have himself conjoined with the first as executor-dative.⁷

Confirmation.

98. Confirmation or testament-dative is essential to enable the executor-dative to give a good discharge to the deceased's debtors and so to ingather the estate. Corporeals which were in the deceased's possession do not require confirmation to give the executor an active title,⁸ and the executor may sue for doubtful debts provided he confirms to the amount received after decree and before extract.⁹ When confirmation is applied for the executor must give up on oath an inventory of the whole moveable estate of the intestate, so far as he can at the time, and must find caution for his intromissions to an amount fixed by the commissary, not exceeding the value of the estate confirmed.¹ When further estate emerges after confirmation, it is given up as an eik to the testament.

Administration and Distribution.

99. The duties of an executor-dative on confirmation are to ingather the estate and to pay the debts of the deceased. One executor has a title to sue for debts due

⁶ *Johnston's Executor v. Dobie*, 1907 S.C. 31; *Martin v. Ferguson's Trustees*, 1892, 19 R. 474.

⁷ *Webster v. Shiress*, 1878, 6 R. 102.

⁸ Ersk. Inst. III., 9, 30.

⁹ *Mackay v. Mackay*, 1914 S.C. 200.

¹ 4 Geo. IV. cap. 98, secs. 2 and 3; Confirmation and Probate Act, 1858 (21 & 22 Vict. cap. 56), sec. 6; *Smith v. Kerr and Smith*, 1868, 7 M. 42; *French*, 1871, 9 M. 741.

to the deceased without the concurrence of his co-executors.² Where the executor declines to sue for a debt, the other heirs *in mobilibus* may sue in his name upon giving him an indemnity for expenses.³ An executor is entitled to require creditors of the deceased whose claims are doubtful to constitute their claims by action at law even when the value of the estate is small.⁴ He is not entitled to distribute the free moveable estate among the heirs *in mobilibus* until the elapse of six months from the intestate's death,⁵ and until he has paid or provided for the debts due by the executry estate.⁶ After six months and after due inquiry into the deceased's debts, the executor is in safety to pay all the known creditors in full and to distribute the free balance, any late creditors being bound to look to the heirs *in mobilibus* who have benefited from the distribution for payment of their debts.⁷ Where, however, a widow died intestate and her daughter confirmed as her executrix to certain of her estate and distributed it, an action was sustained eighteen years later brought at the instance of another child of the intestate to recover from the representatives of the executrix, who had by then died, a share of a deposit receipt which had been taken payable to either the intestate or her daughter and the survivor, and which the daughter when appointed executrix had treated as her personal property.⁸

100. Although a widow without separate means has no preferential right as in a question with creditors to aliment from her deceased husband's estate, she is en-

² *Ballantyne v. Ballantyne*, 1899, 7 S.L.T. 3.

³ *Morrison v. Morrison's Executrix*, 1912 S.C. 892.

⁴ *M'Gaan v. M'Gaan's Trustee*, 1883, 11 R. 249.

⁵ *Gardner*, 28th Nov., 1810, 16 F.C. 59.

⁶ *Lamond's Trustees v. Croom*, 1871, 9 M. 662.

⁷ *Beith v. Mackenzie*, 1875, 3 R. 185.

⁸ *Miller's Executrix v. Miller's Trustees*, 1922 S.C. 150.

titled within six months of her husband's death to payment of a sum for mournings, and to a sum for aliment pending the distribution of the estate,⁹ and provided it is not insolvent. The alimentation of a widow who has no separate means apart from her husband's estate does not form a burden on the husband's estate enabling her to prevent the distribution of the estate among the heirs *in mobilibus* in order to provide security for the contingency of her claim for aliment emerging, but when her claim does emerge her husband's heirs *in mobilibus* may be liable so far as they have benefited.¹ Nor does the burden of alimentering a pauper lunatic daughter prevent the division of the intestate father's estate among his heirs *in mobilibus*.²

101. The appointment of an executor subsists until the administration of the estate has been completed. "So much is this the case that it has never been in use for an executor to obtain a discharge" (*i.e.*, from the Court which appointed him), "because it is held he cannot get a discharge until he has administered the whole estate; and conversely that after he has administered the whole estate he needs no discharge because his office has come to an end."³ Accordingly, the appointment of an executor *qua* factor for minor next-of-kin has been held not to fall on the next-of-kin attaining majority.³ Where the executor dies before the estate has been realised, another executor-dative may be appointed *ad non executum*,⁴ and, so long as there is estate of the deceased which has not been confirmed, a con-

⁹ *Barlass v. Barlass's Trustees*, 1916 S.C. 741.

¹ *Howard's Executor v. Howard's Curator Bonis*, 1894, 21 R. 787; *Anderson v. Grant*, 1899, 1 F. 484.

² *Edinburgh Parish Council v. Couper*, 1923 S.C. 139.

³ *Johnston's Executor v. Dobie*, 1907 S.C. 31; Lord M'Laren at p. 34.

⁴ *Nicol & Carney v. Wilson*, 1856, 18 D. 1000.

firmation *quoad omissa* may be issued either in favour of the executor already confirmed or in favour of another.

102. An executor-dative duly confirmed is not a trustee for the creditors of the deceased, and when he has carried on the business of the deceased he cannot be made liable in a question with such creditors for more than the value of the estate of the deceased as at the date of his death.⁵ He is, however, in a question with creditors, liable to pay out of the executry estate all debts due by the deceased, whether these are merely personal debts or are debts affecting the heirs in heritage.⁶ Neither is an executor a trustee for the heirs *in mobilibus*, whose claims against him are extinguished by the negative prescription.⁷

⁵ *Stewart's Trustee v. Stewart's Executor*, 1896, 23 R. 739; *Livie v. Anderson*, 1903, 11 S.L.T. 229.

⁶ 1503, cap. 76; and cf. sec. 138 *et seq.*, *infra*.

⁷ *Jamieson v. Clark*, 1872, 10 M. 399.

CHAPTER VIII.

CHARGES AFFECTING EXECUTRY.

WIDOW'S £500, s. 104.

JUS RELICTI, s. 107.

JUS RELICTÆ, s. 109.

LEGITIM, s. 113.

103. The balance which in practice emerges on the expiry of six months from the death of the intestate after all his moveable assets have been realised in terms of money, and all the debts due by him during his lifetime and the expenses of executry have been deducted, forms the free moveable estate left by the deceased as being *in bonis* of him at his death. In circumstances peculiar to any particular intestate the free moveable estate *in bonis* of him at his death may be affected by certain preferential charges becoming due thereupon at his death and requiring to be deducted therefrom in order to arrive at the free moveable estate for distribution among his heirs *in mobilibus ab intestato*. These preferential charges are (1) the widow's £500, (2) *jus relictæ*, (3) *jus relictæ*, and (4) legitim.

Widow's £500.

104. Where the intestate is a man dying intestate, domiciled in Scotland, and leaving a widow but no lawful issue, his widow is, under the Intestate Husband's Estate Act, 1911, a creditor to the extent of £500 upon the free moveable estate *in bonis* of him at his death.¹ Where the intestate has disposed by will of any part of his

¹ 1 & 2 Geo. V. cap. 10, secs. 1 and 2.

estate, the widow's right does not arise.² It does not arise in competition with claims of legitim. Nor does it arise as a charge on the succession of heirs *in mobilibus* who are descendants of the intestate, however remote, or by whatever marriage. When the intestate leaves both heritable and moveable estate the charge of £500 is borne by the executry *pro rata* in proportion to the net values of the moveable and heritable estate respectively.³

105. The widow's £500 is given in addition and without prejudice to her rights of terce and *jus relictæ* in the heritable and moveable estate of the intestate remaining after payment of the sum of £500 in the same way as if the residue after payment of the said £500 had been the whole of such intestate's estate, heritable and moveable, and the provision of £500 had not been given.⁴ Where the intestate leaves terceable moveables, such as a bond and disposition in security taken payable to executors, and other non-terceable moveable estate, there is no express provision in the statute for the manner in which the proportion of the £500 charged on moveables falls to be deducted as between the different classes of moveables. In the case figured the widow, as she is a general creditor on the executry, would probably be satisfied by payment of the proportion of the £500 applicable to executry out of the moveables subject to *jus relictæ*, and would not be entitled to maintain that the widow's £500 or any part of it should be deducted from the amount in the bond and disposition in security so as to enable her to take her *jus relictæ* undiminished.

106. Where the intestate's net heritable and moveable estate, taken together, does not exceed £500, the

² *Ibid.*, sec. 1; *Taylor's Executors v. Taylor*, 1918 S.C. 207. For the meaning of dying intestate, cf. sec. 8 *et seq.*, *supra*.

³ 1 & 2 Geo V. cap. 10, sec. 3.

⁴ Intestate Husband's Estate Act, 1911 (1 & 2 Geo. V. cap. 10), sec. 4.

widow is entitled to the whole absolutely.⁵ On an application to the Sheriff in such a case the widow is entitled to be confirmed executrix-dative *qua* relict, and to take up the whole moveable estate.⁶

Jus Relicti.

107. *Jus relict*i is a purely statutory right whereby the widower, on the death of his wife, takes by operation of law the same share and interest in his deceased wife's moveable estate which is taken by a widow in her deceased husband's moveable estate, and subject to the same rules as regards its amount, exclusion, discharge, or satisfaction.⁷ The right arises, irrespective of the date of the marriage, by the death of the wife after 18th July, 1881.⁸ But it is essential to the right arising in the case of marriages entered into prior to that date that the wife should have held her moveable estate exclusive of the *jus mariti*, whether in virtue of her marriage contract or of the settlement of some other person.⁹ No claim of *jus relict*i can be sustained where it would affect the contract of the spouses, whether antenuptial or postnuptial.¹ Also it would appear that if the wife dies after 23rd December, 1920, the husband is entitled to *jus relict*i, notwithstanding that the marriage was entered into prior to 1881, without express exclusion of the *jus mariti*.²

⁵ Intestate Husband's Estate Act, 1911 (1 & 2 Geo. V. cap. 10), sec. 1.

⁶ Intestate Husband's Estate Act, 1919 (9 Geo. V. cap. 9), sec. 3 (1).

⁷ Married Women's Property Act, 1881 (44 & 45 Vict. cap. 21), sec. 6. *Russel v. Attorney-General*, 1917 S.C. 28.

⁸ *Patersons v. Pož*, 1883, 10 R. (H.L.) 73.

⁹ *Fotheringham's Trustees v. Fotheringham*, 1889, 16 R. 873.

¹ Married Women's Property Act, 1881, *supra*, sec. 8.

² Married Women's Property Act, 1920 (10 & 11 Geo. V. cap. 64), sec. 1.

108. The right of the surviving husband, however, is distinguished from the surviving wife's corresponding right to *jus relictæ* in respect that it only arises on the natural death of the wife, and not on the dissolution of the marriage by her divorce.³ It seems not to have been decided that a husband by being divorced forfeits his statutory right to *jus relictæ*.⁴ It would appear that, as the right is given to "the husband" of any woman who may die, it can accrue only to the man who had the status of husband of the woman at the time of her death, otherwise a plurality of divorced husbands might severally claim *jura relictorum* out of her estate at her death, a contingency which would upset the computation of the shares and interests to be taken. The right to *jus relictæ* may be discharged or satisfied by conventional provision.⁵

Jus Relictæ.

109. *Jus relictæ* is the right of a wife on the dissolution of her marriage by her husband's death or divorce⁶ to a share of her husband's free moveable estate. It is a *jus crediti* for payment of a proportion of the value of the free moveable estate fixed as at the date of the dissolution of the marriage, and prestable from his executor in the case of dissolution by death,⁷ and from himself in the case of dissolution by divorce.⁶ It is postponed to all debts contracted by the husband prior to the dissolution of the marriage, and to his deathbed and funeral expenses and the expense of his executry if the dissolution be by death. The extent of the share of *jus relictæ* is one-half if the husband should have no

³ *Eddington v. Robertson*, 1895, 22 R. 430.

⁴ Cf. *Gavin's Trustees v. Walker's Trustees*, 1907, 15 S.L.T. 681.

⁵ *Buntine v. Buntine's Trustees*, 1894, 21 R. 714.

⁶ *Manderson v. Sutherland*, 1899, 1 F. 621.

⁷ *Cameron's Trustees v. Maclean*, 1917 S.C. 416.

children, and one-third if he should have children, at the date of the dissolution of the marriage. By children is meant children who are not disentitled to claim legitim out of their father's estate.⁸ It is prestable only from moveable estate which is moveable *quoad relictam*.⁹

110. Under the law as existing prior to 1855 marriage, in the absence of express stipulation to the contrary, operated an absolute conveyance of the wife's moveable estate to her husband by virtue of the *jus mariti*. As a counterpart the wife obtained certain rights in her husband's moveable estate on the dissolution of the marriage, his moveable estate being regarded by the law *pro hac vice* not as his own absolute property, but as goods held in communion for the family.¹ A distinction was made according as the marriage did or did not endure for a year and a day. If it did not, then the right of the husband and wife returned to the *status quo ante matrimonium*, unless a child has been born of the marriage. But by the Intestate Moveable Succession Act, 1855,² the rights emerging on dissolution within a year and a day were assimilated to those emerging on dissolution after a year and a day. The rights emerging on dissolution after a year and a day varied according as the dissolution took place by the death of the wife or of the husband. When such a marriage was dissolved by the death of the wife, her executor became entitled to a share of the moveable estate belonging to the husband. When the dissolution took place by the death of the husband, the wife herself became entitled to a

⁸ Cf. secs. 116-7, *infra*.

⁹ Cf. sec. 79, *supra*.

¹ *Muirhead v. Muirhead's Factor*, 1867, 6 M. 95; *Fraser v. Walker*, 1872, 10 M. 837.

² 18 & 19 Vict. cap. 23, sec. 7.

share of the moveable estate belonging to her husband. The right of the predeceasing wife's executor was abolished by the Intestate Moveable Succession Act, 1855,³ the compensating *quid pro quo* given to the wife being that she became entitled to *jus relictæ* out of her husband's moveable estate in the event of his predecease within a year and a day of the marriage.⁴

111. Marriage contracted after the 18th July, 1881, ceased to operate as an *ex lege* assignation of the wife's moveable estate to the husband, the compensating *quid pro quo* given being the *jus relictæ* in favour of the husband mentioned in sec. 107, *supra*, and the right in favour of the children to legitim out of their mother's estate,⁵ in all cases where she was possessed of moveable estate free of the *jus mariti*.⁶ Accordingly, only the *jus relictæ* now emerges, and only to the wife herself, on the dissolution of the marriage, whatever its duration.

112. The right to *jus relictæ* may be discharged or satisfied by conventional provisions, and may even be impliedly renounced during marriage.⁷ At common law such a renunciation was revocable as a donation *inter virum et uxorem*, but it is now irrevocable subject to the provision of the Married Women's Property Act, 1920.⁸ The right is also forfeited by the wife upon being divorced.⁹

³ *Ibid.*, sec. 6.

⁴ *Ibid.*, sec. 7.

⁵ Married Women's Property Act, 1881 (44 & 45 Vict. cap. 21), sec. 7.

⁶ *Fotheringham's Trustees v. Fotheringham*, 1889, 16 R. 873; *Dunbar's Trustees v. Dunbar*, 1902, 5 F. 191; affd. 1905, 7 F. (H.L.) 92.

⁷ *Edward v. Cheyne*, 1888, 15 R. (H.L.) 33. *Durrant Stewart's Trustees v. Durrant Stewart*, 1891, 18 R. 1114.

⁸ 10 & 11 Geo. V. cap. 64, sec. 5.

⁹ *Fraser v. Walker*, 1872, 10 M. 837.

Legitim.

113. Legitim is the right of children to a share of the free moveable estate left by their parent at death. It vests in the children on the death of the parent, and is a *jus crediti* for payment of a share out of the entire free executry, and does not constitute a burden upon one part of the estate more than another.¹ It is postponed to payment of all debts contracted by the parent during life, and to payment of deathbed and funeral expenses and expenses of executry.² At common law it is only due out of a father's executry, but by the Married Women's Property Act, 1881, it became due from the mother's executry also.³ Legitim is only due out of moveable estate which is moveable *quoad* legitim, as explained in sec. 79.

114. The extent of the legitim fund is not dependent upon the number of children or the number of marriages by which they are begotten. Where the death of the parent, out of whose estate a claim of legitim arises, does not operate the dissolution of a marriage, the legitim fund consists of a one-half share of the free executry estate.⁴ Where the death does operate the dissolution of a marriage, the legitim fund consists of a one-third share of the free executry estate,⁴ unless the surviving spouse had discharged his or her legal right of *jus relictæ* or *relictæ*, in which case the legitim fund consists of a one-half share of the free executry.⁵

¹ *Macdougall v. Wilson*, 1858, 20 D. 658; *Snody's Trustees v. Gibson's Trustees*, 1883, 10 R. 599.

² Ersk. Inst. III., 9, 22.

³ 44 & 45 Vict. cap. 21, sec. 7.

⁴ Ersk. Inst. III., 9, 19. See, however, *Gavin's Trustees v. Walker's Trustees*, 1907, 15 S.L.T. 681, where on the death of a mother who had divorced her husband the legitim fund was assessed as one-third of her free executry. Cf. also sec. 108, *supra*, on forfeiture of *jus relictæ* by divorce.

⁵ Ersk. Inst. III., 9, 20.

115. The legitim fund is divisible equally among the legitimate and unforisfamiliarated children of the deceased parent irrespective of the marriage by which they were begotten. Posthumous children are entitled to share in it.⁶ The eldest son succeeding to heritage as heir-at-law of the parent is not, however, in a question with the younger children, entitled to share in the moveable estate or, therefore, in the legitim fund, the whole fund being divisible among the younger children unforisfamiliarated where the parent's heritage is taken by his heir-at-law.⁷ Heirs-portioners, being children, are, or the heir who is the only surviving child unforisfamiliarated is, entitled to the whole legitim fund in addition to the heritage.⁸ The share of any child entitled to claim but not claiming legitim at the death of the parent does not accresce to the shares of those claiming, but the parent's executor is released from payment of that share as from a debt.⁹

116. FORISFAMILIATION.—The children of any particular marriage may be forisfamiliarated as a class by reason of conventional provisions conceived in their favour in their parents' antenuptial contract of marriage.¹ The right of the children of a marriage to legitim out of their father's estate is always excluded where his marriage contract contains provisions in favour of all the children of the marriage expressed to be in lieu or in full of legitim; but in a case where the contract contained no provision in favour of the heir of the marriage a declaration in the contract that its provisions were in full satisfaction of legitim was held not to exclude the eldest son's right, and, as he was the only

⁶ *Jervey v. Watt*, 1762, M. 8170.

⁷ *Gilmour's Trustees v. Gilmour*, 1922 S.C. 753.

⁸ *Countess Dowager of Kintore v. Earl of Kintore*, 1886, 13 R. (H.L.) 93. *Cairns v. Cairns' Trustees*, 1916, 1 S.L.T. 42.

⁹ Cf. sec. 120, *infra*.

¹ Ersk. Inst. III., 9, 23.

child unforisfamiliarated, he was entitled to take the whole legitim fund in addition to the heritage.² Legitim from a mother's estate may similarly be excluded by antenuptial contract provisions declared to be in full of legitim by express words or by implication.³ Even when the mother's contract contains no provisions in favour of children, the claim of legitim may be excluded by the Married Women's Property Act, 1881, by reason of the claim affecting her marriage settlement.⁴

117. Any particular child, irrespective of the marriage by which begotten, may be forisfamiliarated either by expressly discharging his right in respect of an *inter vivos* payment, or by expressly renouncing his right in respect of expenditure made on his behalf or even without any consideration.⁵ Acceptance of payments made to the child by the parent will not, however, have the effect of discharging legitim unless the payments were made in satisfaction of legitim.⁶

118. EFFECT OF FORISFAMILIATION.—When all children of the intestate are forisfamiliarated, as by the antenuptial contract of their parent or by having discharged legitim during the parent's lifetime, no claim for legitim can arise at the parent's death, and the result is that the amount which would have formed the legitim fund is thrown into the parent's executry estate to the same effect, so far as regards legal rights, as if the parent had died without leaving any children. Total forisfamiliaration does not, however, in any way qualify the children's rights

² *Countess Dowager of Kintore v. Earl of Kintore*, 1886, 13 R. (H.L.) 93.

³ *Dunbar v. Dunbar*, 1905, 7 F. (H.L.) 92.

⁴ 44 & 45 Vict. cap. 21, sec. 8; *Bell v. Bell*, 1897, 25 R. 310; *Ramsay v. Ramsay's Trustees*, 1904, 12 S.L.T. 654.

⁵ *Obers v. Paton's Trustees*, 1897, 24 R. 719; *Scott's Trustees v. Scott*, 1902, 40 S.L.R. 133.

⁶ *Rait v. Arbuthnot*, 1892, 19 R. 687.

as regards succession proper, and, accordingly, its effect in the absence of competing rights may only be that they take under the name of succession what they would otherwise have taken under the double title of legitim and succession.⁷ In such a case, however, their right is one of succession only, and is subject to all the burdens of succession. Where some only of the children have been forisfamiliated, the unforisfamiliated child or children are entitled to divide the whole legitim fund among themselves.⁸

119. COMPETITION BETWEEN CHILD AND EXECUTOR.— Payments made by parent to child *inter vivos* do not as such, and in the absence of a discharge or renunciation of legitim by the child, operate forisfamiliation. Such payments may or may not require to be reckoned in assessing the amount of a claim of legitim. Whether or not such payments require to be reckoned depends upon whether the reckoning is being held with the parent's executor only, or whether with other children appearing in the reckoning, and a distinction for this purpose is made between payments which created obligations of repayment between parent and child, and payments which did not create obligations of repayment but were made as *præcipua* out of dead's part, or advanced to account of legitim. In general all obligations of debtor and creditor are pleadable *hinc inde* between the executor and any one claiming legitim against the executry, but advances to account of legitim are pleadable only in questions between children claiming legitim, and *præcipua* out of dead's part do not affect a claim of legitim.

⁷ Ersk. Inst. III., 9, 23.

⁸ *Countess Dowager of Kintore v. Earl of Kintore*, 1886, 13 R. (H.L.) 93.

120. In a case in which a son had granted his father a written acknowledgment of various sums as being "payments to me on account of the share of legitim" "that may become due to me through your death, and" "which share of legitim is now discharged by me to" "that extent," the son after his father's death, survived by other children entitled to claim legitim, brought an action of declarator to have it found and declared (1) that he was not bound in a question solely with his father's executor to collate the sums advanced, (2) that the executor was not entitled to set off the sums advanced against his claim of legitim, and (3) that the sums advanced only fell to be collated by him in a question with his brothers and sisters in the event of their claiming on the legitim fund. The Court unanimously assoilized the defenders from all the conclusions of the action.⁹ Lord Johnston, proceeding on a different *ratio* from the other judges, was of opinion that the effect of the other children not claiming legitim was to operate an implied assignation of their share of legitim to the executor, and that the executor was therefore *in titulo* to plead the interest of the non-claiming children to call for collation of the payments as being advances.¹ It was therefore unnecessary for Lord Johnston to determine whether the payment was an advance or a debt. His opinion proceeded on the view that a discharge of legitim by satisfaction after the parent's death operated an assignation of the discharged shares of legitim to the executry, and it was supported by some authorities.² It has, however, been now established that this view of the law is unsound, and that discharge by satisfaction after the parent's death operates not as an assignation of a share of legitim

⁹ *Young v. Young's Trustees*, 1910 S.C. 275.

¹ *Ibid.*, at p. 292.

² *Fisher v. Dixon*, 1842, 2 D. 1121; 1843, 2 Bell's App. 63; *Nisbet's Trustees v. Nisbet*, 1868, 6 M. 567.

to the executry, but as a release of the executor from a debt, viz., the share of legitim discharged, and that the executor is not *in titulo* to plead the interest of the children entitled at death to claim but not claiming.³

121. The majority of the Court in *Young's* case⁴ had proceeded on the view that, while the executor was not entitled to call for collation of advances made to account of legitim, the payments in that particular case were not advances, but had created an obligation of repayment to have effect on the father's death. Lord President Dunedin was of opinion that the father in bargaining bargained to free his "estate general" and not merely the legitim fund, and that consequently the executor was entitled to set off the debt to the "estate general" against the claim of legitim.⁵ The father in that case, however, had died testate, leaving a settlement under which he purported to dispose of the legitim fund, and this fact apparently enabled the Court to arrive at the conclusion that the transaction between father and son was one in which the relation of debtor and creditor was intended to be constituted, the son in return for the advances coming under obligation to allow his father by will to dispose *pro tanto* of his share of legitim.⁶

122. It is clear that a payment by a parent may be regarded (1) as a gift, in which case it may in a question between children be the subject of collation within the legitim fund; or (2) as giving rise to an obligation to repay, in which case it may be recovered by the executor as part of the moveable estate, so as to increase the

³ *Fisher v. Dixon*, *supra*; *Monteith v. Monteith's Trustees*, 1882, 9 R. 982; *Coats' Trustees v. Coats*, 1914 S.C. 744; *Gilmour's Trustees v. Gilmour*, 1922 S.C. 753, at p. 768.

⁴ *Young v. Young's Trustees*, 1910 S.C. 275.

⁵ *Ibid.*, at p. 283.

⁶ *Ibid.* Cf. reasoning of Lord President Dunedin at pp. 282-3.

amount of free executry of which the legitim fund forms a portion. *Young's* case⁷ has, however, given rise to a certain amount of criticism on the ground that it has invented an entirely new category into which such a payment may be thrown, viz., a debt which the executor may not recover as an item of the general executry, but which, as against a claim of legitim, he may set off and so transfer it from the legitim fund to the dead's part of the executry. This has been described as a matter full of difficulty.⁸ If it means that in the case of an intestate parent there may exist debts recoverable only to the dead's part, and not to the general executry as a whole, it is inconsistent with principle. No such proposition, however, is involved in *Young's* case, which turned on the specialty that it was a case of testate succession, and the peculiar expression "estate general" employed in the Lord President's opinion was *secundum materiam subjectam* intended as a synonym for "testament."

123. In all cases of intestate succession the executor may only set off as against a claim for a share of the legitim fund those advances which constituted the relationship of debtor and creditor between the child and his parent during life.⁹ And *e converso* a child claiming his *aliquot* share in the legitim fund, while he may insist on the executor bringing *in computo* all debts due to the deceased, cannot compel the executor to bring into the computation advances to account of legitim made by the parent to children not claiming legitim.¹

124. COLLATIO INTER LIBEROS.—Where a parent is survived by unforisfamiliaried children to one or more

⁷ *Young v. Young's Trustees*, 1910 S.C. 275.

⁸ *Gilmour's Trustees v. Gilmour*, 1922 S.C. 753, by Lord President Clyde at p. 770.

⁹ *Trevelyan v. Trevelyan*, 1873, 11 M. 516.

¹ *Monteith v. Monteith's Trustees*, 1882, 9 R. 982.

of whom he has made advances to account of legitim during his lifetime, then the children claiming on the legitim fund are entitled as among themselves to insist on collation of such advances in the computation of the amounts of their respective shares. The right to insist on collation is an equitable one, the object of which is to maintain equality of interest among the children benefiting from the right to legitim.² All such provisions out of moveable estate in favour of children as are neither expressed nor implied to be *præcipua*, nor are made under obediential obligation, nor on the footing of contract, are held to be advances to account of legitim.³

125. A payment is regarded as being *præcipuum*, or an advance to account of dead's part, either where the intention to make it so is expressed at the time or later, or is implied from the circumstances of and reasons for the payment. Where a father credited his son with a substantial amount to set him up in business, at the same time declaring that the credit was to be a "free gift," the Court held that this declaration, looking to the relatively small value of the father's estate, was too ambiguous to establish the intention to make the credit a *præcipuum*.⁴ Similarly, the purchase money for a commission and promotion in the Army was held not to be a *præcipuum* to the son.⁵ Where the payment is expressed to be in satisfaction of *legitim and executry* it is not a *præcipuum*,⁶ but if expressed to be in addition to legitim it is a *præcipuum*.⁷ The expense of main-

² Ersk. Inst. III., 9, 24.

³ *Duncan v. Crichton's Trustees*, 1917 S.C. 728, Lord Cullen at p. 732.

⁴ *Douglas v. Douglas*, 1876, 4 R. 105.

⁵ *Nisbet's Trustees v. Nisbet*, 1868, 6 M. 567.

⁶ *Gilmour's Trustees v. Gilmour*, 1922 S.C. 753.

⁷ M'Laren, "Wills and Succession," 3rd edition, sec. 329.

tenance and education, and small gifts while the child is in family with the parent, are regarded as having been expended by the parent under obediential obligation, and so do not require to be collated.⁸ Also larger payments to a child in family for services rendered are regarded as having been made as on the footing of contract, and do not require to be collated. A gift of heritage, as it does not diminish the amount of the legitim fund, does not require to be collated. Interest on advances to account of legitim does not require to be collated.⁶

126. A child who survives his parent, entitled to legitim, obtains a vested right or *jus crediti* to a fixed share of the legitim fund, and such a *jus crediti* will transmit in his succession in the event of his death before payment.⁹ The right to claim legitim has been held not to be barred by *mora* and acquiescence even seventeen years after the parent's death, in a case in which a son had abstained from making his claim on reasonable grounds known to the executor.¹ The issue of predeceasing children are not entitled to legitim in their own right, legitim being proper to surviving children alone.

⁸ Ersk. Inst. III., 9, 24.

⁶ *Gilmour's Trustees v. Gilmour*, 1922 S.C. 753.

⁹ *M'Murray v. M'Murray's Trustees*, 1852, 14 D. 1048; *M'Nab v. M'Nab's Executors*, 1894, 32 S.L.R. 177.

¹ *Wick v. Wick*, 1898, 1 F. 199.

CHAPTER IX.

MIXED ESTATES.

WHETHER MOVEABLES HAVE
BECOME HERITABLE, s. 128.

WHETHER HERITAGE HAS BE-
COME MOVEABLE, s. 133.

LIABILITY OF HEIR AND EXE-
CUTOR FOR DEBTS, s. 138.

COLLATIO INTER HÆREDES, s.
141.

127. Where an intestate leaves estate which is heritable in the sense of sec. 34 *et seq.*, *supra*, and also estate which is moveable in the sense of sec. 79 *et seq.*, *supra*, the extent of the respective rights of his heir and his executor to take up the succession, and the extent of their respective liabilities for the intestate's debts, are affected by a number of considerations. With regard to the right of the heir and of the executor to take up the succession, items of the deceased's estate, though moveable in their own nature, may have become heritable in his succession (1) by accession, (2) by destination, or (3) by conversion, and items of the deceased's estate, though heritable in their own nature, may have become moveable in his succession (1) by separation, (2) under statute, or (3) by conversion. The heir and executor are severally liable to the extent of the succession taken up by them respectively for the debts of the intestate, but where either has paid a debt proper to the other an action of relief will lie. Finally, the ordinary rules of distribution of the mixed estate as between the heir-at-law and the heirs *in mobilibus* of the intestate, whereby the former takes the heritage and the latter takes the moveables, may be affected by *collatio inter hæredes*.

Whether Moveables have become Heritable.

128. BY ACCESSION.—When property in its own nature moveable has become (1) so attached physically to a heritable subject that it cannot be disjoined therefrom without injury to itself, or that to which it is attached, it becomes a proper accessory and is heritable by accession; or (2) attached physically to a heritable subject, but remains capable of being detached without injury, it may be heritable by accession, if it is material to the enjoyment or use of the heritable subject, or if there is in the construction of it some adaptation special to the situation in which it has been placed and which it would not possess if placed elsewhere, or if the intention of the owner of it as expressed was to annex it to the heritable subject; but wherever it is clear that the owner in making the annexation did not intend to benefit the heritable subject, the thing attached and moveable in its own nature will not become heritable by accession.¹

129. The following have been held heritable by accession in the succession to an owner or a tenant of land, viz.:—Conservatories and iron fences on policy grounds;² machinery fixed for working minerals under a mineral lease of ordinary duration;³ steam engines bolted to seats resting by gravity on prepared brick foundations, and rails bolted to sleepers resting on a prepared way for working a mineral lease of ordinary duration;⁴ and a threshing mill erected by an agricultural tenant and hung on beams fixed in the walls.⁵ Industrial crops of annual growth remain moveable though growing on the land, the intention of the grower

¹ *Dowall v. Miln*, 1874, 1 R. 1180.

² *Tod's Trustees v. Finlay*, 1872, 10 M. 422.

³ *Brand's Trustees v. Brand's Trustees*, 1876, 3 R. (H.L.) 16.

⁴ *Brand's Trustees v. Brand's Trustees*, 1878, 5 R. 607.

⁵ *Reid's Executors v. Reid*, 1890, 17 R. 519.

not being to benefit the land by accession.⁶ Similarly, a telescope in an observatory,⁷ and spinning machines and other trade utensils being tenant's fixtures in a factory,⁸ have been held to remain moveable as between heir and executor, notwithstanding a certain amount of fixture.

130. BY DESTINATION.—Moveables, though not attached to a heritable subject, may be heritable by destination. Thus dung dedicated to the use of a farm is heritable, and falls to the heir.⁹ Where the deceased leaves buildings in the course of erection, the funds necessary for completion of the building are heritable *destinatione*.¹ The goodwill of a business is heritable by destination where the business is such that its goodwill cannot exist or have value apart from the premises in which it is carried on.²

131. BY CONVERSION.—Moveable property may be converted into heritage at the will of the owner during his lifetime by exchanging the moveable for a heritable subject. Such conversion depends on the will of the owner and where he is *incapax*, or, where the legal title of his estate is in trustees, the intromissions of his curator or trustees with his property will not of itself operate conversion so as to affect his succession *ab intestato*,³ but if the beneficial owner knows of and consents to the

⁶ Stair Inst. II., 1, 2; Ersk. Inst. II., 2, 4; *Begbie v. Boyd*, 1837, 16 S. 232 (plants growing in a nursery for sale). Cf. *Burns v. Fleming*, 1880, 8 R. 226 (ornamental shrubs and gravel walks held accessory in a question between purchaser and seller).

⁷ *Tod's Trustees v. Finlay*, *supra*.

⁸ *Dowall v. Miln*, 1874, 1 R. 1180; *Fisher v. Dixon*, 1845, 17 Jur. 568.

⁹ *Reid's Executors v. Reid*, 1890, 17 R. 519.

¹ *Bank of Scotland v. White's Trustees*, 1891, 28 S.L.R. 891.

² *Bell's Trustees v. Bell*, 1884, 12 R. 85 (pottery business); *Muirhead's Trustees v. Muirhead*, 1905, 7 F. 496 (public-house).

³ *Campbell's Trustees v. Campbell's Trustees*, 1900, 8 S.L.T. 232; *M'Innes v. Hill*, 1912, 1 S.L.T. 80.

investment of his moveable funds in heritable subjects by the trustees, their intromissions will be effectual to operate conversion.⁴ Where a person dies intestate without having converted, evidence of his intention to convert his moveable property so only as to alter the order of his succession will not be admitted.⁵ Where a person dies leaving a will, his will cannot operate constructive conversion of his moveable estate at his death except in so far as it disposes of the same in favour of some person or persons not identical with his heirs *in mobilibus*.⁶

132. BY CONSTRUCTIVE CONVERSION.—Where a testator disposes of the beneficial fee of his estate by will, and directs his trustees after his death to invest the shares of his estate falling to particular beneficiaries in heritable subjects, such a direction will operate constructive conversion of the beneficial fee from moveable to heritable in the succession *ab intestato* to a beneficiary dying before the distribution of the trust estate.⁷

Whether Heritage has become Moveable.

133. BY SEPARATION.—The natural fruits of land which, not requiring to be sown annually, are heritable while growing become moveable when separated from the ground.⁸ Trees when cut down, natural grass when mown, and minerals when brought to the surface, become moveable.⁹

⁴ *Pringle's Trustees v. Hamilton*, 1872, 10 M. 621.

⁵ *Ramsay v. Ramsay*, 1887, 15 R. 25.

⁶ *Cowan v. Cowan*, 1887, 14 R. 670; *Brown's Trustees v. M'Intosh*, 1905, 13 S.L.T. 72; *M'Conochie's Trustees v. M'Conochie*, 1912 S.C. 653.

⁷ *Cunningham v. Cunningham*, 1889, 17 R. 218.

⁸ *Stair Inst. I.*, 4, 17.

⁹ 2 B.C. 2.

134. UNDER STATUTE.—Under the Apportionment Act, 1870, all rents, annuities, dividends, and other periodical payments in the nature of income are deemed to accrue from day to day, and are apportionable in respect of time accordingly.¹ The Act does not apply to minister's stipend,² annual sums payable under policies of insurance,³ or payments stipulated to be without apportionment.⁴ Where termly payments to which the Act applies are due out of a heritable subject, and the creditor dies *currente termino*, the amount of the term's payment when recovered falls to be apportioned between the heir and the executor, notwithstanding that no part of it was due or payable at the date of the intestate's death. Where farm rents are due and payable at Martinmas and Whitsunday for the half-year preceding, and the landlord dies in July, the rents due at Martinmas following are the rents accruing at the date of his death, and fall to be apportioned between his heir and executor under the Act.⁵ Where possession runs from the 28th, or the removal term, and the rent runs from the 15th, or money term, the latter is taken for the purpose of apportionment.⁶

135. Bonds containing obligations for payment of interest, which were at common law heritable after the term for repayment of the principal sum was bygone without repayment, were declared by the Scots Act of 1661 to be moveable in the person of the creditor and to be confirmed by his executor on his death, and to pertain to the nearest of kin according to the practice

¹ 33 & 34 Vict. cap. 35, sec. 1.

² *Latta v. Edinburgh Ecclesiastical Commissioners*, 1877, 5 R. 266.

³ 33 & 34 Vict. cap. 35, sec. 6.

⁴ *Ibid.*, sec. 7; *Macpherson's Trustees v. Macpherson*, 1907 S.C. 1067.

⁵ *Lord Herries v. Maxwell's Curator*, 1873, 11 M. 396.

⁶ *Balfour's Executors v. Inland Revenue*, 1909 S.C. 619.

in moveables, unless they contained an obligation to infeft or were conceived in favour of heirs excluding executors.⁷ The Act, however, provided that such personal bonds should remain heritable *quoad* the widow of the creditor. In practice such bonds as became moveable under the statutes were held to be moveable in computing the amount of the legitim fund, but not in assessing the amount of *jus relictæ*. This distinction has now been abolished, and unless a personal bond contains a destination excluding executors, in which case it is wholly heritable, it is moveable for all the purposes of division into dead's part, *jus relictæ* or *jus relictæ*, and legitim.⁸ Bonds and dispositions in security from which executors are not excluded were made moveable in the creditor's succession only, under the Titles to Land Consolidation Act, 1868, and they still remain heritable in all cases as regards courtesy, terce, *jus relictæ*, *jus relictæ*, and legitim.⁹ As, however, it is the creditor's right under such bonds that is at common law a heritable right in the creditor's succession, a *jus crediti* in trust funds which include bonds payable to executors cannot be regarded as heritable for any purpose, and so it enters into the computation of *jus relictæ*.¹

136. BY CONVERSION.—Heritable property may be converted into moveable by the owner selling the same during his lifetime. Where a legal title to the heritage is in the person of trustees with a power of sale merely, and they sell the heritage as part of the ordinary trust administration, the price will remain heritable in the beneficiaries succession as a surrogatum for the heritable subject.² Where, however, the sale was necessary in

⁷ 1661, cap. 32.

⁸ Conveyancing Act, 1924 (14 & 15 Geo. V. cap. 27), sec. 22 (1).

⁹ 31 & 32 Vict. cap. 101, sec. 117.

¹ *Borland's Trustees v. Borland*, 1917 S.C. 704.

² *Spence v. Paterson's Trustees*, 1873, 1 R. 46; *Cathcart's Trustees v. Heneage's Trustees*, 1883, 10 R. 1205.

order to carry out the trust purposes,³ or was a judicial sale,⁴ or was a sale forced by heritable creditors,⁵ conversion will be operated. When the owner of heritage dies intestate without having converted his heritage, evidence of his intention to do so is not admissible.⁶ Where he leaves a will conveying the legal title to trustees with a power or a direction to sell, but does not dispose of the beneficial fee, his trustees are not entitled to exercise the power or carry out the direction to sell so as to convert the heritage into moveables to the prejudice of the heir-at-law.⁷

137. BY CONSTRUCTIVE CONVERSION.—Where a testator has conveyed the legal title of his heritage to trustees and has disposed of the beneficial fee, and the trustees have not sold the heritage, it may, nevertheless, be constructively converted into moveables *quoad* the succession *ab intestato* to a beneficiary dying before the distribution of the trust estate, where the trustees are directed to sell or have an express or implied power of sale. Where the trustees are directed to sell, the direction will operate conversion, notwithstanding that the latest period has not arrived at which the direction falls to be carried out,⁸ and notwithstanding that only one beneficiary remains alive.⁹ Where the trustees have merely a power of sale, constructive conversion depends upon the presumed intention of the testator, to be gathered from the nature of the heritage and the number of the beneficiaries, in regard to whether the heritage

³ *M'Adam's Executor v. Souters*, 1904, 7 F. 179.

⁴ *Macfarlane v. Greig*, 1895, 22 R. 405.

⁵ *Howden*, 1910, 2 S.L.T. 250.

⁶ *Ramsay v. Ramsay*, 1887, 15 R. 25.

⁷ *Smith v. Wighton's Trustees*, 1874, 1 R. 358; *Cowan v. Cowan*, 1887, 14 R. 670.

⁸ *M'Gulchrist's Trustees v. M'Gulchrist*, 1870, 8 M. 689.

⁹ *Bryson's Trustees v. Bryson*, 1919, 2 S.L.T. 303.

should be conveyed *pro indiviso* to the beneficiaries or whether sale was reasonably necessary to carry out the distribution directed.¹

Liability of Heir and Executor for Debts.

138. Any creditor may elect to sue either the heir or the executor for any debt due by the intestate, whether heritable or moveable, and is not bound to convene both.² This rule is well illustrated by a case in which the executor brought an action against the heir for declarator that on the expiration of the lease of a farm belonging to the deceased the obligation to take over the farm buildings upon it fell to be implemented not by the executor but by the heir. The Court, while of opinion that in a question between the heir and the executor the obligation lay upon the heir, refused the declarator on the ground that its terms might foreclose the creditor in the obligation, who was not a party to the action, from his right to elect to have direct recourse against either the heir or the executor.³

139. RELIEF.—The heir who has paid a debt due out of his ancestor's moveable estate has a statutory right of relief against the executor.⁴ Practice *ex paritate rationis* has given the executor a right of relief against

¹ *Buchanan v. Angus*, 1862, 4 Macq. 374; *Boag v. Walkinshaw*, 1872, 10 M. 870 (implied power of sale—seven beneficiaries—conversion); *Henderson's Trustees v. Henderson*, 1907 S.C. 43 (*pro indiviso* conveyance impliedly excluded—allocation of subjects impracticable—conversion); *Campbell's Trustees v. Dick*, 1915 S.C. 100 (nature of heritage—number of beneficiaries—conversion); *Shepphard's Trustees v. Shepphard*, 1885, 12 R. 1193; and *Anderson's Executors v. Anderson's Trustees*, 1895, 22 R. 254 (express power of sale—sale not necessary to execution of trust—no conversion).

² 1503, cap. 76; Ersk. Inst. III., 9, 48; *Kirkpatrick v. Irvine*, 1841, 2 Rob. 475; *British Linen Bank v. Lord Reay*, 1850, 12 D. 949; *Moncrieff v. Milne*, 1856, 18 D. 1286; *Bain v. Reeves*, 1860, 23 D. 416.

³ *Walker v. Masson*, 1857, 19 D. 1099.

⁴ 1503, cap. 76.

the heir for any heritable debts he may have paid.⁵ In a question of relief between the heir and the executor, debts due by the deceased forming heritable rights in the person of the creditor are regarded as heritable debts.⁶ The obligations under a warrandice clause in ordinary form falls, however, on the executor of the granter.⁷ Where an intestate had purchased heritage burdened with a bond upon the condition that the seller should clear the subjects of incumbrances, and had died before the price was paid or the disposition granted, his executor maintained that, while he might be liable to pay the price, the heir could only take the heritage subject to the bond, and that, accordingly, the executor was entitled to relief against the heir to the extent of the amount contained in the bond. The Court held that, as the intestate was not debtor in any debt binding his heritable estate, his executor had no right of relief against the heir.⁸

140. Where the deceased had bound himself to pay rent for a heritable subject under a lease in favour of himself and another and the survivor, his executor will remain liable for the rent becoming due under the lease, notwithstanding that the sole possession of the subject let has passed to the surviving joint tenant.⁹ Where, however, the subject was let to the deceased and his heirs, who on his death declined to take up the lease, it was regarded as open to question whether the executor was liable to pay the rent becoming due under

⁵ Ersk. Inst. III., 9, 48.

⁶ *Marquis of Breadalbane's Trustees v. Jamieson*, 1873, 11 M. 912 (annuities); *Learmonth v. Sinclair's Trustees*, 1878, 5 R. 548 (tenant's meliorations); *Earl of Breadalbane v. Jamieson*, 1877, 4 R. 667.

⁷ *Duchess of Montrose v. Stuart*, 1887, 15 R. (H.L.) 19.

⁸ *Ramsay v. Ramsay*, 1887, 15 R. 25.

⁹ *Burns v. Martin*, 1887, 14 R. (H.L.) 20.

the lease.¹ The heir of the vassal under a feu contract having refused to take up the succession, the vassal's executors were held not bound to pay the feu-duty accruing after the vassal's death.² Rates and assessments are due out of the fruits of land for the year of assessment. Where a proprietor of land let, the rents of which are postponed, dies at Whitsunday, his executor, though entitled to the rents for the preceding half-year payable at Martinmas, is not liable for the public burdens due from the land for any part of the year after Whitsunday.³

Collatio inter Hæredes.

141. At common law, when the estate of the deceased consisted partly of heritage and partly of moveables, the heir-at-law, though also one of the next-of-kin, took no share of the moveable estate of a domiciled Scotsman⁴ if there were other next-of-kin as near to the deceased in degree as himself, but where the heir-at-law was the sole next-of-kin, he succeeded to both heritage and moveables.⁵ In the earlier Scots law the division of heritage and moveables had been one of equality. When the feudal rule of primogeniture gave the heir-at-law his exclusive right to the heritage, equitable considerations operating in the common law excluded him from sharing in the moveable succession, but excluded him only so long as he stood on the rule of primogeniture. Where the heritage was of small value in proportion to the moveables, the same equity which had operated in favour of the next-of-kin entitled the heir to collate the free

¹ *Bethune v. Morgan*, 1874, 2 R. 186.

² *Aiton v. Russell's Executors*, 1889, 16 R. 625.

³ *Maitland v. Maitland*, 1877, 4 R. 422.

⁴ *Trotter v. Trotter*, 1826, 5 S. 78; 1829, 3 W. & S. 407.

⁵ *Ersk. Inst.* III., 9, 3.

heritage and to compel the next-of-kin to collate the free moveables. The mixed estate resulting from such a collation *inter hæredes* was for the purpose of distribution as between these heirs in that succession regarded as hotchpot divisible equally among them all.

142. Where the collating heirs were children of the deceased, the hotchpot consisted of the heritage subject to the burdens for which the heir was liable on the one part, and of the dead's part of moveables and the legitim fund, *i.e.*, two-thirds or the whole of the free moveable estate according as there was or was not a tripartite division, on the other part. When the deceased was survived by a spouse, the heir was not bound to collate courtesy or terce, and the next-of-kin was not bound to collate *jus relictæ*.⁶ For all purposes other than the distribution *inter hæredes* the component parts of the hotchpot retained their several characters as heritable and moveable, so that the heritable components remained heritable in the succession to any of the collating heirs on his death.⁷

143. The rule of the common law which requires the heir to collate heritage as a condition of sharing in the moveable succession has not been affected by statute. It requires the collation of heritage as the condition on which the heir may claim to share in the moveable estate only where the heir is the proper heir-at-law. By heir-at-law is meant the heir entitled to succeed to heritage by operation of the law of the country in which the heritage is situated.⁸ If he possesses that character, however, it is not material that he takes the heritage by another title than that of heir-at-law. Thus, an heir-at-law who is *alioqui successurus*, as by way of

⁶ *Trotter v. Rothead*, 1681 M. 2375; *Murray v. Murray*, 1678, M. 2374; *Balmain v. Glenfarquhar*, 1719, M. 2378.

⁷ *Napier v. Orr*, 1868, 6 M. 264.

⁸ *Robertson v. MacVean*, 18th Feb., 1817, F.C.

mortis causa conveyance,⁹ or as heir of provision and entail,¹ must collate his heritage as a condition of sharing in the moveable estate. Heirs-portioners succeeding *pro indiviso* are bound to collate as a condition of sharing in the moveable succession. Where one only of a number of heirs-portioners succeeds to the heritage as heir of entail or by other special destination, a distinction is made according as her claim to share in moveables raises a question with her co-heirs-portioners only, or raises a question with others than her co-heirs-portioners. Where, as is the case when the deceased is survived by daughters only, the heirs in heritage and the heirs in moveables are identical, the eldest daughter taking heritage as an heir of provision is not bound to collate with her sisters, because in a question with them alone (*i.e.*, in the only question relating to moveable succession) she is not an heir-at-law but a pure heir of provision.² Where, however, as is the case where the deceased is survived by grand-daughters only, being the daughters of an elder and a younger predeceasing son, the heirs-portioners or daughters of the elder son are not identical with the heirs in moveables who include the daughters of the younger son, a different result follows. In such a case, where one of the heirs-portioners takes the heritage as heir of provision, she is bound to collate as a condition of sharing in the moveables, the reason being that in a question with the daughters of the younger son (*i.e.*, in the question relating to moveable succession) she is a proper heir-at-law as standing on the rule of primogeniture in place of her father.³

⁹ *Fisher's Trustees v. Fisher*, 1844, 7 D. 129.

¹ *Anstruther v. Anstruther*, 1836, 2 S. & M'L. 369; *Breadalbane v. Chandos*, 1836, 2 S. & M'L. 377.

² *Riccart v. Riccart*, 1720 M. 2378; commented on by Lord Cottenham in *Anstruther v. Anstruther*, 1836, 2 S. & M'L. 369, at p. 374.

³ *Balfour v. Scott*, 1787 M. 2379; commented on by Lord Cottenham *loc. cit.*

144. The Intestate Moveable Succession Act, 1855, while not affecting the obligation of an heir to collate heritage as the condition of sharing in the moveable succession, has extended the right of the heir-at-law to share in the moveable succession upon collation. At common law this right was confined to such heirs-at-law as were also among the next-of-kin. Since the date of the statute an heir-at-law, though not one of the next-of-kin, may by collation obtain a right to share in the moveable succession when he is an heir *in mobilibus* entitled to succeed by virtue of the doctrine of representation introduced by the statute.⁴ It was at one time thought that the section referred to conferred upon heirs-at-law a right by collation to share in moveables, even where had there been no heritage in the succession they would not have had right to share in moveables.⁵ This view has been reconsidered and the section construed more in conformity with the common law, and it is now settled that collation only operates a right in favour of an heir-at-law who is also either one of the next-of-kin or one of the heirs *in mobilibus* as representing a predeceasing descendant or a predeceasing collateral of the intestate under sec. 1 of the statute.⁶ But an important distinction falls to be drawn between the case of an heir-at-law who is also one of the next-of-kin and an heir-at-law who is only entitled to succeed as an heir *in mobilibus* under the statute. The heir-at-law who is one of the next-of-kin is always entitled by collation to share in the moveable estate. On the other hand, the heir-at-law who is merely a statutory heir *in mobilibus* may find himself either (1) as having as full a right on collation as if he had been next-of-kin, or (2) as having a right on collation which he is bound to share with others.

⁴ 18 & 19 Vict. cap. 23, secs. 1 and 2.

⁵ *Jamieson v. Walker*, 1896, 23 R. 547.

⁶ *Colville's Judicial Factor v. Nicoll*, 1914 S.C. 62.

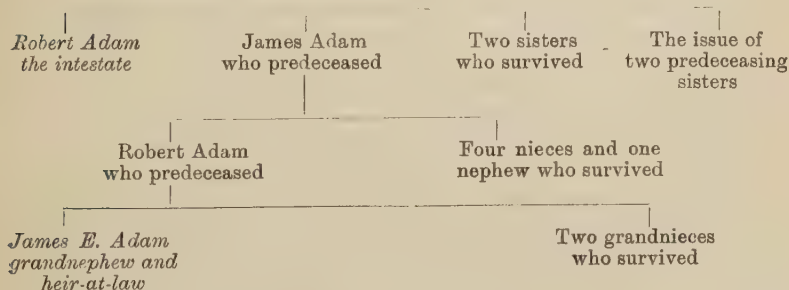
145. An heir-at-law who, though merely a statutory heir *in mobilibus*, is also the only child of a predeceasing member of the class of surviving next-of-kin is entitled on collation to share in the moveable succession as fully as an heir who is next-of-kin.⁷ Thus, where the class of next-of-kin surviving at the death of the intestate are children or brothers and sisters, as the case may be, the heir-at-law who is the only child of a predeceasing son or brother of the intestate, as the case may be, is on collation entitled to an equal share of the hotchpot or mixed estate, the division being according to the number of members of the class of next-of-kin, whether surviving or predeceasing leaving descendants. Heirs-portioners who are the only daughters of a predeceasing member of the class of surviving next-of-kin are similarly entitled to an equal share of the hotchpot on collation. An heir-at-law and statutory heir *in mobilibus* who is only one of a number of children of a predeceasing member of the class of surviving next-of-kin is not entitled to an equal share of the hotchpot, such an heir being bound to share with his surviving brothers and sisters *per capita*, and with the descendants of his predeceasing brothers and sisters *per stirpes*, what he has gained from the moveable estate by the collation.⁸ Thus, if the intestate leaves heritage valued at £1000 and free moveables valued at £8000, and is survived by two daughters, and a grandson and grand-daughter being the children of a predeceasing son, the grandson as heir-at-law by collating the heritage brings the hotchpot up to £9000, divisible into three parts of £3000 each. He has thus gained £2000 by collation, and this £2000 he is bound to share equally with his sister. The division of the hotchpot in such a case then works out at (1)

⁷ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23), sec. 2.

⁸ *Innes v. Coghill*, 1897, 25 R. 23.

the intestate's daughters take £3000 each, or £6000 in all; and (2) the grandson takes £2000 and the granddaughter £1000, or £3000 in all. Under the statute the grand-daughter or her descendants would have taken £2000 had her brother not collated heritage, and, accordingly, collation by an heir-at-law who is one of a number of children of a predeceasing member of the class of surviving next-of-kin affects only the share of moveables taken by his brothers and sisters and their descendants, and does not affect the shares taken by the surviving next-of-kin.

146. An heir-at-law who is only a statutory⁹ heir *in mobilibus*, and is more remote than the immediate descendant, or child, of a predeceasing member of the class of surviving next-of-kin, is probably entitled to collate and claim a share of the moveable succession, but the point seems to have been regarded as open to doubt on the ground that the right of such an heir to collate is by statute limited to the case where he is the immediate child of the person predeceasing in the sense of sec. 2, and the person predeceasing in the sense of sec. 2 is defined by sec. 1 to be a person who, had he survived, would have been among the intestate's next-of-kin.¹ In the case cited, which was a multiplepounding, the survivorship was as follows:—



⁹ Intestate Moveable Succession Act, 1855 (18 & 19 Vict. cap. 23).

¹ *Adam's Executrix v. Maxwell*, 1921 S.C. 418, per Lord Justice-Clerk at pp. 430-1.

The intestate left heritable and moveable estate, and the heir-at-law declined to collate the heritage. Competing claims were lodged for (1) the sisters and issue of predeceasing sisters, (2) the nieces and nephew, and (3) the grandnieces, but the real competition was between (2) and (3), and was as to the division of moveables within the heir's *stirps*. The Court held that the nieces and nephew took no share of moveables (1) as their father whom they represented under sec. 1 of the statute would not, by survivorship merely, have been entitled to a share of moveables; and (2) as they were not sisters of the heir-at-law under sec. 2 of the statute. As regards the grandnieces' claim, the Lord Ordinary found that they were under sec. 2 of the statute entitled to a share of the moveable estate equal in amount to the excess in value over the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent Robert Adam had he survived the intestate would have taken on collation. In respect of the ratio of heritage to moveables in the particular case, and of the fact that Robert had five brothers and sisters, nothing would have been taken by him on collation. In the Inner House the grandnieces maintained that the true measure of their right was the excess in value as aforesaid which their grandfather, James Adam, would have taken on collation had he survived. The Court rejected this contention on the ground that James Adam was not their predeceasing parent in the sense of sec. 2 of the statute.

147. It is an open question whether the heir-at-law and one of the next-of-kin on the death of the intestate acquires a *jus crediti* in the moveable estate, the condition of enforcement of which is collation, or whether he acquires that right only on collation. In the cases where the right to collate has been claimed by the re-

representatives of the heir-at-law dying without collating, matters have not been entire. In a case decided under the law of apparenecy the apparent heir had died without service as heir, and the next heir had made up title. On the representatives of the apparent heir claiming the share of moveables that he could have claimed on collation, it was held that, as they were unable to collate the heritage, they were not entitled to claim a share in the moveables.² In that case Lord Ardmillan expressed the view that the right of an heir-at-law and one of the next-of-kin is primarily a right to heritage which he may extend by collation, but the ground of judgment of the Court seems to favour the view that it is a *jus crediti* in the moveable estate also, which may transmit to his representatives and be enforced by them provided they are in a position to fulfil the condition of enforcement. In another case, where the heir-at-law had sold part of the heritage, his representatives claimed the right to share in the moveable succession by collation. As the succession, however, was testate, the claim preferred was to a share of the legitim fund, and the Court decided that by selling part of the heritage which he took under the will the heir-at-law had elected to abide by his conventional provisions in satisfaction of legitim.³

148. The right of the heir-at-law to claim a share in the moveable succession of the intestate is dependent upon his being in a position to collate the whole heritage to which he succeeded in the succession to that intestate. Heritage is effectually collated by the heir making up title and conveying it to himself and the heirs *in mobilibus* in *pro indiviso* shares.⁴ But the heir may also effectually collate by accounting to the executors for

² *Newbigging's Trustees v. Steele's Trustees*, 1873, 11 M. 411.

³ *M'Call's Trustee v. M'Call's Curator Bonis*, 1901, 3 F. 1065.

⁴ *Murray v. Murray*, 1678 M. 2374.

the value of his heritage, and the executors are not entitled to insist on a conveyance in *forma specifica*.⁵ It would seem, however, that an heir who has sold the heritage cannot collate by accounting to the executors for the price.⁶ Where the heritage taken by the heir-at-law is subject to the fetters of an entail, he is bound to collate the value of his life interest as at the date when succession opened to him.⁷

149. Where under the operation of the Thellusson Act the income from a mixed estate falls into intestacy, the persons entitled to succeed to each rent are the heirs who, if the fee had been unsettled and had descended in the ordinary course of intestate succession, would have been fiars at the time the rent falls due.⁸ The heir-at-law thus taking the rents of heritage is not entitled to a share of the income from moveables without collating.⁹ But he may, as each term's rent falls due, elect whether or not to collate irrespective of whether he had collated the previous term's rent or not.¹

150. Where the deceased has by will purported to dispose of his whole moveable estate, the heir-at-law, being a child of the deceased, must collate heritage as a condition of sharing in the legitim fund.² Collation in such a case brings into hotchpot (1) the heritage, and (2) the legitim fund, and so the heritage does not fall to be added to the gross moveable estate before the legi-

⁵ *Fisher's Trustees v. Fisher*, 1850, 13 D. 245.

⁶ *M'Call's Trustee v. M'Call's Curator Bonis*, 1901, 3 F. 1065.

⁷ *Anstruther v. Anstruther*, 1836, 2 S. & M'L. 369; *Breadalbane v. Chandos*, 1836, 2 S. & M'L. 377.

⁸ *Logan's Trustees v. Logan*, 1896, 23 R. 848. Cf. sec. 14, *supra*.

⁹ *Moon's Trustees v. Moon*, 1899, 2 F. 201.

¹ *Hunter's Trustees v. Edinburgh Chamber of Commerce*, 1911, 2 S.L.T. 287.

² *Dawson's Trustees v. Dawson*, 1913, 2 S.L.T. 210.

tim fund is struck.³ As the surviving spouse of an intestate is not an heir in moveables of the predeceasing spouse, and as the legal rights of the surviving spouse are not affected by collation, an heir-at-law is not, in a question with the surviving spouse only, compelled to collate heritage as a condition of sharing in the legitim fund and the dead's part of moveables.⁴

³ *Gilmour v. Gilmour's Trustees*, 1920, 2 S.L.T. 369.

⁴ *Balmain v. Glenfarquhar*, 1719, M. 2378.

APPENDICES.

APPENDIX I.

TABLE OF LEGAL RIGHTS AFFECTING MOVEABLES IN SCOTS LAW.

A. BIPARTITE OR TRIPARTITE DIVISION.

Intestate survived by—

1. Spouse and child or children.	The division of moveable estate is tripartite into (1) <i>jus relictæ</i> or <i>jus relictī</i> , (2) legitim fund, and (3) dead's part.
2. Spouse alone.	The division is bipartite into (1) <i>jus relictæ</i> or <i>jus relictī</i> , and (2) dead's part. (But the widow's £500 falls to be deducted from the net estate before the bipartite division is made.)
3. Child or children alone.	The division is bipartite into (1) legitim, and (2) dead's part.
4. Spouse and child or children; the spouse having discharged legal rights before the dissolution of the marriage.	The division is bipartite as in No. 3 above.
5. Spouse and children; some but not all of the children having discharged legitim during their parent's lifetime.	The division is tripartite as in No. 1 above.
6. Spouse and children; all children except the heir-at-law having discharged legitim during their parent's lifetime.	The division is tripartite as in No. 1 above.
7. Spouse and children; all children, without exception, having discharged legitim during their parent's lifetime.	The division is bipartite as in No. 2 above.
8. Spouse alone, who has discharged legal rights prior to dissolution of marriage.	No division; the whole being dead's part. (But the widow's £500 falls to be deducted from the net estate before the dead's part is arrived at for purposes of succession <i>ab intestato</i> .)

Intestate survived by—

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| 9. Children alone, some of whom have discharged legitim during parent's lifetime. | The division is bipartite as in No. 3 above. |
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| 10. Children alone, all of whom, except the heir-at-law, have discharged legitim during parent's lifetime. | The division is bipartite as in No. 3 above. |
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| 11. Children alone, all of whom, without exception, have discharged legitim during parent's lifetime. | No division ; the whole being dead's part. |
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B. DIVISION OF A LEGITIM FUND.

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| 1. An only child. | Only child takes the whole fund, notwithstanding that he may be heir-at-law succeeding to heritage. |
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| 2. Children. | Children, excluding the heir-at-law, succeeding to heritage and not collating share the fund equally. If the heir collates heritage and claims his share of moveables, the heritage is collated with the legitim fund plus the dead's part, and the hotchpot is shared equally. If the heir's claim is to legitim alone, the heritage is collated with the legitim fund only and the hotchpot shared equally. (<i>Collation inter hæredes does not benefit jux relicteæ or jux relictæ.</i>) |
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| 3. Children, some of whom only have discharged legitim during their parent's lifetime. | The unforsfamiliated children share the whole fund equally. (Excluding the heir-at-law not collating as in No. 2 above.) |
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|---|---|
| 4. Children, all of whom, except the heir-at-law, have discharged legitim during their parent's lifetime. | The heir-at-law, though succeeding to heritage, takes the whole legitim fund. |
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Intestate survived by—

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5. Children, some of whom accept provisions in satisfaction of legitim after their parent's death.
- The legitim fund is divided into equal shares according to the number of unforsifamiliated children surviving at the death of the parent, and excluding the heir-at-law not collating. The children whose claims of legitim have not been satisfied each take one of these shares. The remaining shares, allocated to children whose claims have been satisfied, inure to the benefit of the dead's part by releasing the executor from a debt.
-
6. Children, some of whom have received advances to account of legitim during their parent's lifetime.
- The total amount of all the advances falling to be collated *inter liberos* are added to the amount of the legitim fund as struck in the tripartite or bipartite division, as the case may be. The summation is divided into equal shares according to the number of children. Each child then takes one paper share of the summation under deduction of the advances he or she has collated, and the balance due each child is struck. The amount of the actual legitim fund is then divided among the children rateably according to the amount of the balance brought out as standing to their respective credits. Thus, if the legitim fund is £900, and there are three younger children, A, B, and C, each claiming legitim, A having received an advance of £100, B an advance of £500, and C no advance, the summation on collation amounts to £1500, and there are three paper shares of £500 each. A takes $£500 - £100 = £400$. B takes $£500 - £500 = £0$. C takes $£500 - £0 = £500$. If, however, B is satisfied with his advances and does not claim legitim, so that the only claimants on the legitim fund are A and C, the result works out as follows:—One-third of the legitim fund of £900 having been abandoned, two-third shares, or £600, only is prestable from the executor. To this £600 the combined advances to the competing children A and C are added, viz., $£100 + £0 = £100$, making a summation of £700 and giving A and C each one paper share of £350. Deducting advances to each competing child, a balance remains due to A of $£350 - £100 = £250$, and to C of $£350 - £0 = £350$. The amount of the legitim fund prestable, i.e., £600, is allotted £250 to A and £350 to C.
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APPENDIX II.

COMPARATIVE TABLES OF INTESTATE MOVEABLE SUCCESSION IN SCOTLAND AND ENGLAND.

In these comparative tables it is postulated (1) that the deceased died intestate leaving moveable estate only, and (2) that death occurred after 1st January, 1926. The first postulate is necessary for the sake of clearness and simplicity in tabulating Scots law, because, in the first place, the widow's statutory £500 when it arises depends not on there being intestate succession to her husband's moveable estate, but on her husband's total intestacy, and, in the second place, the right of an heir-at-law succeeding to heritage, to participate in the moveable succession also sometimes depends on collation *inter hæredes*, and sometimes it does not. To deal with all such considerations and their various combinations would render tables so complicated as to destroy their value.

The second postulate is necessary because 1st January, 1926, is the date at which the Administration of Estates Act, 1925 (15 Geo. V. cap. 23), came into operation and laid down a simplified code of intestate succession for England. Under Part III. of the statute succession in real estates and succession in personal estates are assimilated. Sec. 23 provides that on the death of a person intestate his personal representatives hold (1) his real estate upon trust to sell, and (2) his personal estate upon trust to convert into money, except that his personal chattels are not to be sold without special reason. After payment of debts and costs what remains upon trust is "the residuary estate of the intestate."

Part IV. of the statute deals with the distribution of this residuary estate and the leading provisions are contained in secs. 46 and 47, which are printed on page 164,

infra. Under them the general scheme of intestate succession is that the residuary estate is held upon trust in the first place for certain life interests and *præcipua* created in favour of the surviving spouse, if any, and *quoad ultra* upon the statutory trusts for heirs. The heirs in each category of heirship are confined to such individuals as were alive at the death of the intestate, but vesting in any heir is postponed until he attains twenty-one years of age or marries under that age. The order of heirs is (1) issue, (2) father and mother or survivor, (3) brothers and sisters-german, (4) brothers and sisters half-blood, (5) grandparents or survivor, (6) uncles and aunts-german, and (7) uncles and aunts half-blood. There is full representation of predeceasers in each degree, according to their stocks. In the half-blood no distinction is made between consanguinean and uterine relationship. The residuary estate is held upon trust for the foregoing categories of relatives in their order of priority as above. Where in any category either (1) none have survived the intestate, or (2) though surviving the intestate none have taken a vested interest by attaining twenty-one years of age or marrying under that age, the trust is in favour of the next category, and so on, and where none in any category takes a vested interest the residuary estate held upon the statutory trusts belongs to the surviving spouse, if any, absolutely, and if none, then to the Crown or the Duchy of Lancaster or the Duke of Cornwall, as the case may be.

TABLE I.—HUSBAND DYING, SURVIVED BY HIS WIDOW AND HIS DESCENDANTS.

If he dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 1.—Widow and his child or children. [<i>N.B.</i>—For the rights of the children <i>inter se</i>, see Table V.]	Widow, $\frac{1}{3}$ as <i>jus relicte</i>. Child or children, $\left\{ \begin{array}{l} \frac{1}{3} \text{ as legitim.} \\ \frac{1}{3} \text{ or remainder as} \\ \frac{1}{3} \text{ dead's part.} \end{array} \right.$	Widow, $\left\{ \begin{array}{l} \text{Personal chattels and } \pounds 1000. \\ \text{Liferent of } \frac{1}{3} \text{ of residue.} \end{array} \right.$ Child or children, $\left\{ \begin{array}{l} \frac{1}{3} \text{ of residue and reversion} \\ \text{to } \frac{1}{3} \text{ of residue liferented} \\ \text{by widow.} \end{array} \right.$
2.—Widow and his grandchildren or remoter descendants, but predeceased by all his children. [<i>N.B.</i>—For the rights of issue <i>inter se</i>, see <i>Ibid.</i> V.]	Widow, $\frac{1}{2}$ as <i>jus relicte</i>. Grandchildren or remoter descendants, $\left\{ \begin{array}{l} \frac{1}{2} \text{ or remainder as} \\ \text{mother descendants, } \left\{ \begin{array}{l} \frac{1}{2} \text{ or remainder as} \\ \text{dead's part.} \end{array} \right. \end{array} \right.$	[But the interest of the child or children is held on "the statutory trusts." On failure of the statutory trusts for the intestate's relatives in their order, the widow takes the whole absolutely in preference to the Crown.] Widow, $\left\{ \begin{array}{l} \text{Personal chattels and } \pounds 1000. \\ \text{Liferent of } \frac{1}{3} \text{ of residue.} \end{array} \right.$ Grandchildren or remoter descendants, $\left\{ \begin{array}{l} \frac{1}{3} \text{ of residue and reversion} \\ \text{to } \frac{1}{3} \text{ of residue} \\ \text{liferented by widow.} \end{array} \right.$ [<i>N.B.</i>—But subject to the note No. 1 above.]

TABLE II.—HUSBAND DYING, SURVIVED BY HIS WIDOW BUT PREDECEASED
BY ALL HIS DESCENDANTS.

If he dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 3.—Widow and his heirs <i>in mobilibus</i>, such as, e.g., brothers and sisters and father or mother. [N.B.—For the rights of heirs <i>in mobilibus inter se</i>, see Table VI.]	Widow, { £500 out of net estate. ½ of residue as <i>jus relicte</i>. Heirs <i>in mobilibus</i>, { ½ of residue or the remainder as dead's part.	Widow, { Personal chattels and £1000. Liferent of whole of residue. Heirs <i>in mobilibus</i>, { Reversion to the residue liferented by the widow. [But subject to the note No. 1 of Table I.]
4.—Widow and no heirs <i>in mobilibus</i> of him.	Widow, { £500 out of net estate. ½ of residue as <i>jus relicte</i>. Remainder to Crown as <i>ultimus heres</i>.	Widow, the whole absolutely. [I.e., the statutory trusts for relatives having failed.]

TABLE III.—WIFE DYING, SURVIVED BY HER WIDOWER AND HER DESCENDANTS.

If she dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 5.—Widower and her child or children. [N.B.—For the rights of children <i>inter se</i>, see Table V.]	Widower, $\frac{1}{3}$ as <i>jus relictæ</i>. Child or children, $\left\{ \begin{array}{l} \frac{1}{3} \text{ as legitim.} \\ \frac{1}{3} \text{ or remainder as} \\ \text{dead's part.} \end{array} \right.$	Widower, $\left\{ \begin{array}{l} \text{Personal chattels and £1000.} \\ \text{Liferent of } \frac{1}{2} \text{ of residue.} \end{array} \right.$ Child or children, $\left\{ \begin{array}{l} \frac{1}{2} \text{ of residue and reversion} \\ \text{to } \frac{1}{2} \text{ of residue liferented} \\ \text{by widower.} \end{array} \right.$ [But subject to the note to No. 1 of Table I.]
6.—Widower and her grandchildren or remoter descendants but predeceased by all her children. [N.B.—For the rights of issue <i>inter se</i>, see Table V.]	Widower, $\frac{1}{2}$ as <i>jus relictæ</i>. Grandchildren or remoter descendants $\frac{1}{2}$ or remainder as dead's part.	Widower, $\left\{ \begin{array}{l} \text{Personal chattels and £1000.} \\ \text{Liferent of } \frac{1}{2} \text{ of residue.} \end{array} \right.$ Grandchildren or remoter descendants, $\left\{ \begin{array}{l} \frac{1}{2} \text{ of residue and rever-} \\ \text{sion to } \frac{1}{2} \text{ of residue} \\ \text{liferented by widower.} \end{array} \right.$ [But subject to the note to No. 1, Table I.]

TABLE IV.—WIFE DYING, SURVIVED BY HER WIDOWER BUT PREDECEASED
BY ALL HER DESCENDANTS.

If she dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 7.—Widower and her heirs <i>in mobilibus</i>, as, <i>e.g.</i>, brothers or sisters and father or mother. [<i>N.B.</i>—For the rights of heirs <i>in mobilibus inter se</i>, see Table VI.]	Widower, $\frac{1}{2}$ as <i>jus relictæ</i>. Heirs <i>in mobilibus</i> $\frac{1}{2}$ or remainder as dead's part.	Widower, { Personal chattels and £1000. { Liferent of whole of residue. Heirs <i>in mobilibus</i>, reversion to residue liferented by widower. [But subject to the note to No. 1, Table I.]
8.—Widower and no heirs <i>in mobilibus</i> of her.	Widower, $\frac{1}{2}$ as <i>jus relictæ</i>. Remainder to Crown as <i>ultimus hæres</i>.	Widower, the whole absolutely. [<i>I.e.</i>, the statutory trusts for relatives having failed.]

TABLE V.—PERSON DYING WITHOUT LEAVING A SPOUSE BUT SURVIVED BY DESCENDANTS.

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 9.—Child or children only.	Child or children, $\left\{ \begin{array}{l} \frac{1}{2} \text{ as legitim.} \\ \frac{1}{2} \text{ or remainder as} \\ \text{dead's part.} \end{array} \right.$ [The legitim is shared equally subject to collation <i>inter vivos</i>, and the dead's part is shared equally <i>per capita</i>.]	Child or children, the whole. [But subject to the statutory trusts for all or any of them who attain twenty-one years of age or marry under that age, the division among such being in equal shares.]
10.—Child or children and issue of predeceasing children.	Child or children, $\frac{1}{2}$ as legitim. Child or children and $\left. \begin{array}{l} \text{issue of predeceasing} \\ \text{children,} \end{array} \right\} \frac{1}{2} \text{ or remainder as dead's part.}$ [The legitim is shared equally subject to collation <i>inter vivos</i>, and dead's part is shared equally, children taking <i>per capita</i> and the issue of predeceasing children taking <i>per stirpes</i>.]	Child or children and issue $\left. \begin{array}{l} \text{of predeceasing children,} \\ \end{array} \right\} \text{the whole.}$ [But subject to the statutory trusts for all or any of those who attain twenty-one years of age or marry under that age, the division being in equal shares among children and the issue of predeceasing children according to their stocks.]

TABLE V.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 11.—Grandchildren only.	Grandchildren, the whole as dead's part. [The division being in equal shares <i>per capita</i>.]	Grandchildren, the whole. [But subject to the statutory trusts noted in No. 9 of this Table.]
12.—Grandchildren and issue of predeceasing grandchildren.	Grandchildren and issue of predeceasing grand-children, } the whole as dead's part. [The division being in equal shares, grandchildren taking <i>per capita</i> and the issue of predeceasing grand-children <i>per stirpes</i>.]	Grandchildren and issue of predeceasing grand-children, } the whole. [But subject to the statutory trusts noted in No. 10 of this Table.]

TABLE VI.—PERSON DYING WITHOUT LEAVING EITHER A SPOUSE OR DESCENDANTS.

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 13.—Brothers and sisters of full blood, half-blood consanguinean, and half-blood uterine, and also by father and mother. [N. B.—For rights of predeceasers, see No. 16 <i>et seq.</i>, <i>infra</i>.]	Father, $\frac{1}{2}$. Brothers and sisters } $\frac{1}{2}$ equally among of full blood, } them <i>per capita</i>.	Father and mother, the whole in equal shares. [Where lineal ascendants survive the intestate, and the residuary estate is held upon statutory trust for them, there is no postponement of vesting.]
14.—Brothers and sisters of full blood and mother.	Mother, $\frac{1}{2}$. Brothers and sisters } $\frac{1}{2}$ equally among of full blood, } them <i>per capita</i>.	Mother, the whole absolutely. [See note to No. 13 of this Table.]
15.—Brothers and sisters of full blood.	Equally <i>per capita</i>.	Equally <i>per capita</i>. [But subject to the statutory trust for all or any of them who attain the age of twenty-one or marry under that age.]

TABLE VI.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 16.—Brothers and sisters of full blood and the issue of predeceasers.	Equally among brothers and sisters <i>per capita</i> and the issue of predeceasing brothers and sisters <i>per stirpes</i>.	Equally among brothers and sisters and the issue of predeceasers according to their stocks. [But subject to the statutory trusts.]
17.—Children of brothers and sisters of the full blood and issue of predeceasers.	Equally among the children <i>per capita</i> and the issue of predeceasers <i>per stirpes</i>.	Equally among the children and the issue of predeceasers, issue taking through all degrees according to their stocks. [But subject to the statutory trusts.]
18.—Brothers and sisters of the half-bloods and father and mother.	Father, $\frac{1}{2}$. Brothers and sisters } $\frac{1}{3}$ equally <i>per capita</i>. consanguinean, }	Father and mother, the whole in equal shares absolutely.

TABLE VI.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 19.—Brothers and sisters of the half-bloods and mother.	Mother, $\frac{1}{2}$. Brothers and sisters } $\frac{1}{2}$ equally <i>per capita</i>. consanguinean,	Mother, the whole absolutely.
20.—Brothers and sisters of the half-bloods and issue of predeceasers.	Brothers and sisters consanguinean <i>per capita</i> and issue of predeceasers <i>per stirpes</i>.	Brothers and sisters consanguinean and uterine, and the issue of predeceasers equally according to their stocks. [But subject to the statutory trusts.]
21.—Children of brothers and sisters of the half-bloods and issue of predeceasers.	Children of brothers and sisters consanguinean <i>per capita</i> and issue of predeceasers <i>per stirpes</i>.	Children of brothers and sisters consanguinean and uterine, and issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]

TABLE VI.—Continued.

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 22.—Brothers and sisters uterine and father and mother.	Father, the whole.	Father and Mother equally, absolutely.
23.—Brothers and sisters uterine and mother.	Mother, the whole.	Mother, the whole absolutely.
24.—Brothers and sisters uterine and issue of predeceasers and uncles and aunts. [N.B.—For rights of uncles and aunts <i>inter se</i> , see Nos. 26, 30, and 33, <i>infra</i> .]	Brothers and sisters uterine <i>per capita</i> and issue of predeceasers <i>per stirpes</i> , $\left. \begin{array}{l} \\ \end{array} \right\} \frac{1}{2}$ Uncles and aunts equally <i>per capita</i> , $\frac{1}{2}$	Brothers and sisters uterine and issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]
25.—Children of brothers and sisters uterine and issue of predeceasers and uncles and aunts.	Children of brothers and sisters uterine and issue of predeceasers in equal shares <i>per stirpes</i> , <i>i.e.</i> , according to the number of brothers and sisters uterine who left issue, $\left. \begin{array}{l} \\ \end{array} \right\} \frac{1}{2}$ Uncles and aunts equally <i>per capita</i> , $\frac{1}{2}$	Children of brothers and sisters uterine and issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]

TABLE VI.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 26.—Uncles and aunts of full blood and of half-bloods and grandparents.	Uncles and aunts of the full blood equally.	Grandparents equally, absolutely.
27.—Uncles and aunts of the full blood and of half-bloods.	Uncles and aunts of the full blood equally.	Uncles and aunts of full blood equally. [But subject to the statutory trusts.]
28.—Uncles and aunts of the full blood and issue of predeceasers.	Uncles and aunts equally. [<i>I.e.</i> , there being no representation among collaterals after the descendants of brothers and sisters.]	Uncles and aunts and issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]
29.—Children of uncles and aunts of the full blood and the issue of predeceasers.	Children of uncles and aunts equally.	Children of uncles and aunts and issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]

TABLE VI.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 30.—Paternal and maternal uncles and aunts.	Paternal uncles and aunts equally.	Paternal and maternal uncles and aunts equally. [But subject to the statutory trusts.]
31.—Paternal and maternal uncles and aunts of the half-bloods and issue of predeceasers.	Paternal uncles and aunts consanguinean equally.	Paternal and maternal uncles and aunts of the half-blood consanguinean and uterine and the issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]
32.—Children of uncles and aunts of the half-bloods and issue of predeceasers.	Children of uncles and aunts consanguinean equally.	Children of uncles and aunts consanguinean and uterine and the issue of predeceasers according to their stocks in equal shares. [But subject to the statutory trusts.]

TABLE VI.—*Continued.*

If Person dies Intestate.	1.—Domiciled in Scotland.	2.—Domiciled in England.
Survived by— 33.—Uncles and aunts of the half-blood uterine and maternal uncles and aunts of the full blood and maternal grandparents.	None of these.	Maternal grandparents equally absolutely.
34.—Grandfathers and grandmothers and granduncles and grandaunts.	Agnatic grandfather, the whole.	Grandfathers and grandmothers equally absolutely.
35.—Great-grandfather and granduncles and grandaunts and issue of predeceasing granduncles.	Granduncles and grandaunts equally.	None of these.
36.—Great-grandparents and great granduncles.	Agnatic great grandfather, the whole.	None of these.

APPENDIX III.

NOTES ON INTESTATE SUCCESSION IN BRITISH DOMINIONS.

Union of South Africa.

COMMON LAW OF SOUTH AFRICA.—Under the Roman-Dutch, or common law of South Africa, relatives, for the purpose of succession *ab intestato*, are reckoned in degrees of propinquity according to the number of births intervening between the intestate and his relatives. These degrees of relationship are thus in the following order:—1st degree, *descendants*, children; *ascendants*, father and mother; *collaterals*, none; 2nd degree, *descendants*, grandchildren; *ascendants*, paternal and maternal grandfathers and grandmothers; *collaterals*, brothers and sisters-german, consanguinean and uterine; 3rd degree, *descendants*, great grandchildren; *ascendants*, the four great grandfathers and the four great-grandmothers; *collaterals*, (a) uncles and aunts paternal and maternal by the full and by the half-bloods consanguinean and uterine, and (b) children of 2nd degree collaterals (*i.e.*, nephews and nieces); 4th degree, *descendants*, great-great-grandchildren; *ascendants*, the eight great-great-grandfathers and the eight great-great-grandmothers; *collaterals*, (a) granduncles and grandaunts, paternal and maternal by the full blood and the half-blood consanguinean and uterine, and (b) children of 3rd degree collaterals (*i.e.*, cousins, and grandnephews and grandnieces).

The rule that “the mother makes no bastard” entitles the bastard to succeed to his mother and her blood relatives in the same way as a legitimate child does, and *vice versa*. The degrees of propinquity through males depend upon legitimate birth or legitimation per *subsequens matrimonium*.

In the order of succession *ab intestato* descendants to the remotest degree succeed first to the exclusion of ascendant and collateral lines of propinquity. Among descendants the rule of representation is admitted *in infinitum*. Descendants of the nearest surviving degree take equally *per capita* and the issue of predeceasers of that degree take equally *per stirpes* the share the predeceaser would have taken on survival. To a mother's estate her illegitimate children succeed on equal terms with her legitimate children.

Failing all descendants, the succession ascends to the father and mother of the intestate, each taking one-half share of the estate. Where one parent has predeceased, the half-share allocated to him or her is taken by the intestate's collaterals of the 2nd degree, being the children of the predeceasing parent, whether or not they are also children of the surviving parent. The half-blood here shares with "the full hand," that is to say, on equality with the full blood, because they succeed by virtue of the predecease of a common parent. Such collaterals of the 2nd degree succeed to the one-half share, allocated to their predeceasing parent, equally *per capita* and the issue of predeceasers of them equally *per stirpes*, but provided such issue are not more remote than the 4th degree. In collateral succession representation is admitted only up to and including the 4th degree of propinquity. Where the issue of such 2nd degree collaterals have failed up to and including the 4th degree, the half-share accresces to the surviving parent to the exclusion of all other collaterals.

Failing descendants and both parents, the succession opens to the 2nd degree collaterals direct, the issue of predeceasers up to and including the 4th degree representing their parents, and the division among the nearest in degree being *per capita* and the issue of predeceasers being *per stirpes*. Failing 2nd degree collaterals and their issue up to and including the 4th degree—*i.e.*, brothers and sisters (2nd degree), their children (3rd degree), and their grandchildren (4th degree)—the remoter issue of 2nd degree collaterals succeed

per capita in the nearest surviving degree, the issue of predeceasers not taking by representation. The half-blood shares with "the half-hand." Under this rule the estate is divided into two equal shares, of which the full blood divides one share with the consanguinean half-blood, if any, and one share with the uterine half-blood, if any.

Failing descendants, both parents and brothers and sisters and their descendants to the remotest degree the succession ascends *in lineas*, one-half going to the next-of-kin on the father's side and the other half to the next-of-kin on the mother's side. In this division *per lineas* the order of succession is that grandparents on either side are preferred to uncles and aunts on the same side. Where the succession opens to collaterals in this branch, representation applies with division *per capita* and *per stirpes* up to the 4th degree. After the 4th degree there is no representation, and the nearest degree alone succeeds *per capita*. When collaterals succeed to a moiety by virtue of the predecease of one grandparent only, the division among the half-blood is with the full hand, but where they succeed to the whole share by the predecease of both grandparents, the half-blood take with the half hand.

Failing grandparents and uncles and aunts and their descendants *in lineam*, the succession next ascends to the great-grandparents *in lineas*, and failing them to the granduncles and grandaunts and their descendants. Failing all next-of-kin in any line, the succession accresces to the surviving lines of ascent. On the failure of all blood relatives, the estate goes to the Crown as *bona vacantia*.

Heritable and Moveable.—The common law of South Africa makes no distinction between succession in heritable and in moveable estate.

Spouses.—Under the common law a surviving spouse has no right of succession *ab intestato* as such. Where, however, marriage was entered into on the footing of communion of goods the common law provides for a division of the goods in communion as between the surviving and the repre-

sentatives of the predeceasing spouse. The right of a surviving spouse is, however, regulated by statutes, and varies in different parts of the Union.

Canada.

ALBERTA.—The order of succession is—(1) Children, taking equally *per capita* and the issue of predeceasers equally *per stirpes*, but when all children have predeceased, the nearest surviving degree of descendants and the issue of predeceasers succeed, all degrees taking equally *per stirpes*, according to the number of the intestate's children who died leaving issue; (2) failing descendants, the father, and failing the father, the mother takes the whole estate; (3) brothers and sisters and the issue of predeceasers *per stirpes* next succeed; but where all brothers and sisters have failed the division among their descendants is *per capita*, the nearer degree excluding the more remote. The whole and the half-blood, males and females, are on a footing of equality, and a mother makes no bastard. No distinction is made between real and personal property as regards succession. With regard to the right of a surviving spouse, the widower takes half of his predeceasing wife's real estate if issue of the marriage survives, and the whole if no issue survives, and in either event he takes the whole personal estate. The widow takes all her predeceasing husband's estate if no issue has been born; if she has borne one child she takes one-half, and if one or more of a number of children born survives she takes one-third.

BRITISH COLUMBIA.—The order of intestate succession after 1st May, 1926, is—(1) Descendants and the issue of predeceasers equally *per stirpes*, according to the number of children surviving or predeceasing leaving issue; (2) the father and mother equally or the survivor; and (3) brothers and sisters and their descendants, with representation, up to and including the children of brothers and sisters. The half-blood succeeds equally with the full blood. No distinc-

tion is now made between the descent of real and of moveable estate. The widow takes the whole estate of her predeceasing husband if no descendants survive, and one-third if descendants survive.

MANITOBA.—The order here is—(1) Children and the issue of predeceasers equally *per stirpes*, (2) the father, (3) the mother and the brothers and sisters in equal shares, failing brothers and sisters, then the mother, and failing the mother, then the brothers and sisters and the children of predeceasers equally *per stirpes*, but there is no representation beyond children of brothers and sisters. No distinction is made between real and personal estate, and the half-blood is on equality with the full blood. The widow takes the whole estate if no descendants survive, and one-third if descendants survive. The separate property of a married woman dying intestate is distributable in the same manner as that of a husband.

NOVA SCOTIA.—The order of succession here is—(1) Descendants of the nearest surviving degree equally *per capita*, and the issue of predeceasers *per stirpes*; (2) father and mother equally or survivor; (3) brothers and sisters equally *per capita*, and the children of predeceasers *per stirpes*, with no further representation. Real and personal estates descend in the same order, and the half-blood is on equality with the full blood. In the event of no descendants surviving, the widow takes one-half of the real and personal estate, but if issue survives, she takes one-third of the personal estate only. Failing kindred, the widow takes the whole personal estate in preference to the Crown. The widower is tenant by courtesy of his predeceasing wife's real estate, whether she leaves issue or not, and his right to her personal estate is similar to that of a widow's right to the personal estate of her predeceasing husband.

ONTARIO.—The order is—(1) Descendants and the issue of predeceasers *per stirpes*; (2) the father, whom failing the mother; (3) brothers and sisters equally *per capita*, and the

children of predeceasers *per stirpes*, with no representation beyond children of brothers and sisters. The widow, if no descendants survive, takes 1000 dollars and one-half of the residue, if issue survive she takes one-third only, without *præcipuum*. The widower, if no issue survives, takes one-half, and if issue survives one-third.

QUEBEC.—No distinction is made between real and personal estate, and the surviving spouse is included among those entitled to succeed *ab intestato*. The order of succession is—(1) (a) Spouse, one-third, (b) descendants of nearest degree, two-thirds equally *per capita*; (2) (a) spouse, one-third, (b) parents, one-third equally, and (c) brothers and sisters, whom failing nephews and nieces, one-third equally *per capita*; (3) (a) spouse, one-half, and (b) parents, one-half equally; and (4) (a) spouse, one-half, and (b) brothers and sisters or more remote collaterals of equal degree, one-half equally *per capita*. Failing the spouse, the relatives in the order indicated inherit the whole estate.

SASKATCHEWAN.—The order here is—(1) Descendants of nearest degree equally *per capita*, and the issue of predeceasers *per stirpes*; (2) father and mother equally or survivor; (3) brothers and sisters equally *per capita* and the children of predeceasers *per stirpes*, with no representation beyond children of brothers and sisters. No distinction is made between real and personal estate, and a mother makes no bastard. A surviving spouse, if no issue survives, takes the whole; if one child or the issue of one predeceasing child should survive, then one-half; and if more than one child survives personally or stirpitably, then one-third.

Australia.

NEW SOUTH WALES.—The order of intestate succession in this State is as follows:—(1) Descendants of the nearest surviving degree succeed equally *per capita* and the issue of predeceasers equally *per stirpes*; (2) the father; (3) the mother, brothers, and sisters succeed equally *per capita*, and the

children of predeceasing brothers and sisters stand in place of their parent; (4) failing brothers and sisters, the mother succeeds to the whole, and failing the mother, brothers and sisters succeed to the whole, the children of predeceasing brothers or sisters standing in place of their parents; (5) the grandfathers, whom failing the grandmothers; (6) the great-grandfathers, whom failing the great-grandmothers, are of equal degree with uncles and aunts and nephews and nieces of the intestate, and they and the survivors share equally *per capita*; (7) great-great-grandparents, granduncles and aunts, first cousins, and grandnephews and nieces are all of equal degree, and they and the survivors of them share equally *per capita*. Among descendants representation is admitted to the fullest extent. Among collaterals the only representation admitted occurs where the intestate is survived by some member of the class of brothers and sisters and it operates to entitle the children of a predeceasing brother or sister to take in place of their parent, with no further representation. The children of brothers and sisters do not in their own right succeed next after brothers and sisters, the grandparents being reckoned nearer of kin, but where a brother or sister survives, nephews and nieces taking by representation obtain a preference over grandparents. Where the intestate is survived by his widow she takes one-third in preference to his children and one-half in preference to his next-of-kin. In any division among children the law of this State requires advances to be collated *inter liberos*. The half-blood shares equally with the full blood.

Ireland.

Irish law, following the common law of England, distributes the personal estate of an intestate in the following order:—(1) Descendants of the nearest surviving degree succeed equally *per capita*, and the issue of predeceasers equally *per stirpes*; (2) the father; (3) the mother, brothers, and sisters share equally *per capita*, the children of predeceasing brothers and sisters taking *per stirpes*; (4) failing

brothers and sisters, the mother succeeds to the whole, and failing the mother, the brothers and sisters, with representation in favour of the children of predeceasers, succeed to the whole; (5) the grandparents; (6) the great-grandparents, uncles, and aunts and nephews and nieces. There is no representation among collaterals after children of brothers and sisters, thus nephews or nieces exclude grandnephews and nieces. Where issue survive the widow is entitled to one-third of the personal estate, and where no issue survives she is entitled to one-half of the personal estate in preference to the next-of-kin. Paternal and maternal relatives are on a footing of equality with the full blood.

APPENDIX IV.

STATUTES AFFECTING SCOTLAND AND ENGLAND.

A. SCOTLAND,

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SCOTLAND.

ACT 1503, CAP. 76.

Item anent the exceptions proponed be heretoures, quhen they ar persewed for debtes of their fathers, or fore-bears, to quhome they succede, allegand that their fathers' moveable gudes suld pay their debtes, and that the executors suld be called before them. It is advised, statute and ordained, that it sall be liefful to the creditour to follow the aire, after the by-passing of ane zeir. Because the executors suld be responsal for ane zeir; at the end of the quhilk, he suld give his compt. And gif it pleasis the aire, he may, and suld be diligent, and require the Ordinar within the said zeir, to aske compt, and he to see the compt, and quhat beis foundin remanent, over the things perteinand to their office, that he suld require the Ordinar, that he micht have caution and sovertie for the relieving of his heretage, in sa far as the gudes restis attour the compt. And that the Ordinar sall cause him to have sufficient caution thereof. And sa at the end of the zeir, the aire sall answeere to everilk creditour.

ACT 1661, CAP. 32.

(Concerning Heritable and Moveable Bonds.)

Our Sovereign Lord with advice and consent of His Estates of Parliament for many just and reasonable causes moving him statutes and ordains that all contracts and obligations for sums of money payable to parties at any time, made and dated since the sixteenth day of November, 1641, or to be made in time coming containing clauses for payment of annualrent and profit, are and shall be holden and interpret to be moveable bonds except in these cases following, viz., That they bear an express oblidgment to infett or that they be conceived in favour of heirs and assignees secluding executors in either of which cases ordains the sums to be heritable and to pertain to the heir; other wayes to be confirmed by the executor and to appertain to the nearest of kin and to the defunct's executors and legators according to the law and practick of moveables; declaring alwayes that all such bonds *quoad fiscum* shall remain in the same condition as they were before the said sixteenth day of November, 1641, not to fall under the compass of single escheat, nor shall any part thereof pertain to the relict *jure relictæ* where the bonds are made to the husband, nor to the husband *jure mariti* where the bonds are made to the wife, unless the

relict or husband have otherwayes right and interest thereto, declaring nevertheless that this provision shall no way prejudice wife nor husband and their executors of their respective titles and interests to the bygone annualrents of the saids bonds, resting before either of their deaths.

(*Vide* Conveyancing Act, 1924, sec. 22.)

ACT 1681, CAP. 10.

(*Concerning Wives' Terces.*)

Our Sovereigne Lord, considering that sometimes through the ignorance and inadvertencie of some writters and nottars clauses are insert in contracts of marriage containing provisions by husbands in favours of their wives, without mentioning the terce that is due to her by law, or expressing the provision to be granted in satisfaction of the terce, whereby occasion is given to relicts to claime a terce out of their husband's estates by and attour the provision conceived in their favours, contrary to the meaning and intention of the parties' contracters: For remeed whereof, the King's Majesty, with advice and consent of the Estates of Parliament, statutes and ordains, That, in time coming, where there shall be a particular provision granted by an husband in favours of his wife, either in a contract of marriage or some other writ, before or after the marriage, that the wife shall be thereby secluded from a terce out of any lands or annual rents belonging to her husband, unless it be expressly provided in the contract of marriage or other writ containing the said provision, that the wife shall have right to a terce by and attour the particular provision conceived in her favours: But prejudice alwayes to the Lords of Session to determine as to contracts of marriage, or provisions already made, according to the former law and custom.

ACT 1695, CAP. 41.

(*Anent Executry and Moveables.*)

Our Sovereign Lord, considering that the law is defective as to the affecting with legal diligence the moveable estate which pertained to a defunct, either for his own or his nearest-of-kin's debt, in such manner as a defunct's heritage may be affected by charging to enter heir in the known manner: Doth therefore, with advice and consent of the Estates of Parliament, statute and ordain, That in the case of a move-

able estate left by a defunct, and falling to his nearest-of-kin, who lyes out and doth not confirm, the creditors of the nearest-of-kin may either require the procurator-fiscal to confirm and assign to them, under the peril and pain of his being lyable for the debt if he refuse, or they may obtain themselves decerned executors-dative to the defunct, as if they were creditors to him; with this provision always, that the creditors of the defunct doing diligence to affect the said moveable estate, within year and day of their debtor's decease, shall always be preferred to the diligence of the said nearest-of-kin: And it is further declared, That, in the case of any depending cause or claim against a defunct the time of his decease, it shall be leisum to the pursuer of the said cause or claim to charge the defunct's nearest-of-kin to confirm executor to him within twenty days after the charge given; which charge so execute shall be a passive title against the person charged, as if he were a vitious intromitter, unless he renounce, and then the charger may proceed to have his debt constitute, and the *hereditas jacens* of moveables declared lyable by a decret *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form.

ACT 4 GEO. IV. CAP. 98.

(*For the better Granting of Confirmations in Scotland.*—
[19th July, 1823.]])

I. Be it enacted that from and after the passing of this Act, in all cases of intestate succession, where any person or persons who, at the period of the death of the intestate, being next-of-kin, shall die before confirmation be expedie, the right of such next-of-kin shall transmit to his or her representatives, so that confirmation may and shall be granted to such representatives, in the same manner as confirmations might have been granted to such next-of-kin immediately upon the death of such intestate.

II. And be it further enacted, that . . . the court granting confirmation shall fix the amount of the sum for which caution shall be found by the person or persons to whom confirmation shall be granted, not exceeding the amount confirmed.

III. And be it further enacted, that . . . every person requiring confirmation shall confirm the whole moveable estate of a deceased person known at the time, to which such person shall make oath: Provided always that it shall

and may be lawful to eik to such confirmation any part of such estate that may afterwards be discovered, provided the whole of such estate so discovered shall be added upon oath as aforesaid. . . .

IV. Provided further, and be it enacted, that in the case of confirmation by executor's creditor, such confirmation may be limited to the amount of the debt and sum confirmed to which such creditor shall make oath. . . .

INTESTATE MOVEABLE SUCCESSION ACT, 1855.

(18 & 19 Vict. cap. 23.)

I. *The issue of a predeceasing next-of-kin shall come in the place of their parent in the succession to an intestate.*—In all cases of intestate moveable succession in Scotland accruing after the passing of this Act, where any person who, had he survived the intestate, would have been among his next-of-kin, shall have predeceased such intestate, the lawful child or children of such person so predeceasing shall come in the place of such person, and the issue of any such child or children, or of any descendant of such child or children who may in like manner have predeceased the intestate, shall come in the place of his or their parent predeceasing, and shall respectively have right to the share of the moveable estate of the intestate to which the parent of such child or children or of such issue, if he had survived the intestate, would have been entitled: Provided always that no representation shall be admitted among collaterals after brothers' and sisters' descendants, and that the surviving next-of-kin of the intestate claiming the office of executor shall have exclusive right thereto, in preference to the children or other descendants of any predeceasing next-of-kin, but that such children or descendants shall be entitled to confirmation when no next-of-kin shall compete for said office.

II. *Issue of predeceasing heir succeeding to the intestate's heritage may collate, but other issue not excluded by his not collating from claiming out of moveable estate difference between value of heritage and share their parent would have taken on collation.*—Where the person predeceasing would have been the heir in heritage of an intestate leaving heritable as well as moveable estate had he survived such intestate, his child, being the heir in heritage of such intestate, shall be entitled to collate the heritage to the effect of claiming for himself alone, if there be no other issue of the predeceaser, or for himself and the other issue of the predeceaser, if there

be such other issue, the share of the moveable estate of the intestate which might have been claimed by the predeceaser upon collation if he had survived the intestate; and daughters of the predeceaser, being heir-portioners of the intestate, shall be entitled to collate to the like effect; and where, in the case aforesaid, the heir shall not collate, his brothers and sisters, and their descendants in their place, shall have right to a share of the moveable estate equal in amount to the excess in value over the value of the heritage of such share of the whole estate, heritable and moveable, as their predeceasing parent, had he survived the intestate, would have taken on collation.

III. *Father to succeed to extent of one-half when no issue.*—Where any person dying intestate shall predecease his father without leaving issue, his father shall have right to one-half of his moveable estate, in preference to any brothers or sisters or their descendants who may have survived such intestate.

IV. *Where father has predeceased, mother to succeed to extent of one-third.*—(Repealed by Intestate Moveable Succession Act, 1919.)

V. *Succession by brothers- and sisters-uterine.*—Where an intestate dying without leaving issue, whose father and mother have both predeceased him, shall not leave any brother- or sister-german or consanguinean, nor any descendant of a brother- or sister-german or consanguinean, but shall leave brothers- and sisters-uterine, or a brother- or sister-uterine, or any descendant of a brother- or sister-uterine, such brothers- and sisters-uterine and such descendants in place of their predeceasing parent shall have right to one-half of his moveable estate.

VI. *On a wife predeceasing her husband her representatives to have no claim on the goods in communion.*—Where a wife shall predecease her husband, the next-of-kin, executors, or other representatives of such wife, whether testate or intestate, shall have no right to any share of the goods in communion, nor shall any legacy or bequest or testamentary disposition thereof by such wife affect or attach to the said goods or any portion thereof.

VII. *Not to affect rights of spouses on dissolution of marriage in certain cases.*—Where a marriage shall be dissolved before the lapse of a year and day from its date, by the death of one of the spouses, the whole rights of the survivor and of the representatives of the predeceaser shall be the same as if the marriage had subsisted for the period aforesaid.

VIII. *Part of Act of Parliament of Scotland, 1617, c. 14, repealed.*— . . . and executors-nominate shall, as such, have no right to any part of the said estate.

IX. *Interpretation of terms.*—The words “intestate succession” shall mean and include succession in cases of partial as well as of total intestacy; “intestate” shall mean and include every person deceased who has left undisposed of by will the whole or any portion of the moveable estate in which he might, if not subject to incapacity, have tested; “moveable estate” shall mean and include the whole free moveable estate on which the deceased, if not subject to incapacity, might have tested, undisposed of by will, and any portion thereof so undisposed of.

TITLES TO LAND CONSOLIDATION ACT, 1868.

(31 & 32 Vict. cap. 101.)

* * * * *

CXVII. *Heritable Securities to form Moveable Estate; except where conceived in favour of Heirs, excluding Executors and quoad fiscum—Not to belong to Husband jure mariti, nor to Wife jure relictæ—Nor to be computed in legitim.*—From and after the commencement of this Act no heritable security granted or obtained either before or after that date shall, in whatever terms the same may be conceived, except in the cases hereinafter provided, be heritable as regards the succession of the creditor in such security, and the same, except as hereinafter provided, shall be moveable as regards the succession of such creditor, and shall belong after the death of such creditor to his executors or representatives *in mobilibus*, in the same manner and to the same extent and effect as such security would, under the law and practice now in force, have belonged to the heirs of such creditor: Provided always, that where any heritable security is or shall be conceived expressly in favour of such creditor, and his heirs or assignees or successors, excluding executors, the same shall be heritable as regards the succession of such creditor, and shall after the death of such creditor belong to his heirs in the same manner and to the same extent and effect as is the case under the existing law and practice in regard to heritable securities: And provided also, that where a creditor in any existing or future security recorded, or on which an instrument has followed recorded in the register of sasines, shall desire to exclude executors, it shall be competent for him to do so by executing a minute in the form

or as nearly as may be in the form of schedule (DD) hereto annexed, and recording the same in the appropriate register of sasines, and upon such minute being recorded the security to which it refers shall be heritable in the manner and to the extent and effect hereinbefore provided; and further, provided that where in any existing or future security which has not been recorded, or followed by an instrument recorded in the register of sasines, or where in the case of any conveyance or deed of or relating to such security not recorded in the register of sasines, the creditor shall desire to exclude executors, it shall be competent for him to do so by endorsing a minute, in the form or as nearly as may be in the form of schedule (DD) hereto annexed, on the security or on the deed of conveyance thereof in his favour which has not been recorded as aforesaid, and recording the same, along with such security or with such deed or conveyance as the case may be, in the appropriate register of sasines, and upon such security or deed or conveyance, as the case may be, and minute being so recorded the security shall be heritable in the manner and to the extent and effect hereinbefore provided, and, where executors shall be excluded in the security, or by minute recorded as aforesaid, the security shall continue to be heritable as regards the succession of the creditor for the time holding such heritable security, until the exclusion of executors shall be removed, which it shall be lawful for such creditor to do either by executing a minute in the form or as nearly as may be in the form of schedule (EE) hereto annexed, and recording the same in the appropriate register of sasines, whereupon the security shall become moveable as regards the succession of such creditor, as provided by this Act, or by assigning, conveying, or bequeathing such security to himself or to any other person, without expressing or repeating such exclusion, and upon such assignation, conveyance, or bequest taking effect, the security shall become moveable as regards the succession of such creditor or other person, as the case may be, as provided by this Act: And further, provided that all heritable securities shall continue, and shall be heritable *quoad fiscum*, and as regards all rights of courtesy and terce competent to the husband or wife of any such creditor, and that no heritable security, whether granted before or after marriage, shall to any extent pertain to the husband, *jure mariti*, where the same is or shall be conceived in favour of the wife, or to the wife *jure relictæ*, where the same is or shall be conceived in favour of the husband, unless the husband or relict has or shall have right and interest therein otherwise; declaring, nevertheless, that this provision shall in no way prejudice the rights and interests of wife or husband, or of the creditors of either, in

or to the bygone interest and annual rents due under any such heritable security and *in bonis* of the husband or wife respectively prior to his or her death; and further provided, that where legitim is claimed on the death of the creditor no heritable security shall to any extent be held to be part of the creditor's moveable estate in computing the amount of the legitim.

* * * * *

CLX. *Right to Heirship-Moveables abolished*.—From and after the passing of this Act no heir of line of a party deceased shall be entitled to claim in that character any portion of the moveable estate of such predecessor as heirship-moveables, such claim being hereby abolished.

* * * * *

CONVEYANCING (SCOTLAND) ACT, 1874.

(37 & 38 Vict. cap. 94.)

* * * * *

IX. *Estates to vest in heirs without service*.—A personal right to every estate in land descendable to heirs shall, without service or other procedure, vest or be held to have vested in the heir entitled to succeed thereto, by his survivance of the person to whom he is entitled to succeed, whether such person shall have died before or after the commencement of this Act, provided the heir shall be alive at the date of the commencement of this Act, if such person shall have died before that date, and such personal right shall, subject to the provisions of this Act, be of the like nature and be attended with the like consequences, and be transmissible in the same manner as a personal right to land under an unfeudalised conveyance, according to the existing law and practice.

* * * * *

XII. *Heir not liable beyond value of estate—May renounce*.—An heir shall not be liable for the debts of his ancestor beyond the value of the estate of such ancestor to which he succeeds, and if an heir shall renounce the succession, the creditors of the ancestor shall have the same rights against the estate as upon a renunciation according to the law before the commencement of this Act. When an heir has, before renunciation, intromitted with the ancestor's estate, he shall be liable for the ancestor's debts to the extent of such intromission, but no further.

XIII. *Right of any person to succession as heir may be challenged within twenty years.*—The right of any person to an estate in land by succession as heir acquired after the commencement of this Act may, at any time within twenty years of his infestment as heir and his entering into possession of such estate, but not thereafter, be challenged by any one who would have been entitled to challenge the decree of service of such person had he expedie a service according to the practice existing prior to this Act; and, in the absence of evidence to the contrary, the date of his infestment shall, for the purpose of this limitation, be assumed to be the date of entering into possession; and such challenge may be made by an action to negative or set aside the alleged right of succession, or to reduce any title expedie in virtue of such alleged right.

XIV. *Legal remedies to prevent entry preserved.*—Nothing herein contained shall prejudice or affect the legal remedies of any person having lawful title and interest to prevent any other person from entering into possession of an estate in land as heir, or to remove him from possession, or to obtain sequestration of such estate, or the appointment of a judicial factor pending the trial of any question regarding the right of succession; and it shall be lawful for a Court of competent jurisdiction to regulate possession pending such trial, as the Court shall see just, notwithstanding the completion, under this Act, of the title of any person as heir.

* * * * *

XXXVII. *Distinction between heritage and conquest abolished.*—The distinction between fees of heritage and fees of conquest is hereby abolished with respect to all successions opening after the commencement of this Act, and fees of conquest shall descend to the same persons, in the same manner, and subject to the same rules as fees of heritage.

* * * * *

MARRIED WOMEN'S PROPERTY ACT, 1881.

(44 & 45 Vict. cap. 21.)

* * * * *

VI. *Right given to husband in wife's moveable succession.*—After the passing of this Act the husband of any woman who may die domiciled in Scotland shall take by operation of

law the same share and interest in her moveable estate which is taken by a widow in her deceased husband's moveable estate, according to the law and practice of Scotland, and subject always to the same rules of law in relation to the nature and amount of such share and interest, and the exclusion, discharge, or satisfaction thereof, as the case may be.

VII. *Children of women dying domiciled in Scotland to have right of legitim, &c.*—After the passing of this Act the children of any woman who may die domiciled in Scotland shall have the same right of legitim in regard to her moveable estate which they have according to the law and practice of Scotland in regard to the moveable estate of their deceased father, subject always to the same rules of law in relation to the character and extent of the said right, and to the exclusion, discharge, or satisfaction thereof, as the case may be.

VIII. *Exempting contracts and certain legal rights from operation of Act.*—This Act shall not affect any contracts made or to be made between married persons before or during marriage, or the law relating to such contracts, or the law relating to donations between married persons, or to a wife's non-liability to diligence against her person, or any of the rights of married women under the recited Act.

[See Married Women's Property Act, 1920.]

INTESTATE HUSBAND'S ESTATE ACT, 1911.

(1 & 2 Geo. V. cap. 10.)

I. *Intestates' estate not exceeding five hundred pounds to belong to widow where no issue.*—The heritable and moveable estate of every man who shall die intestate domiciled in Scotland, after the passing of this Act, leaving a widow but no lawful issue, shall, in all cases where the net value of such heritable and moveable estate, taken together, shall not exceed five hundred pounds, belong to his widow absolutely and exclusively.

II. *Widow to be a creditor for five hundred pounds if estate exceeds this amount.*—Where the net value of the heritable and moveable estate in the preceding section mentioned shall exceed the sum of five hundred pounds, the widow of such intestate shall be entitled to five hundred pounds part thereof absolutely and exclusively, and shall be a creditor

upon the whole of such heritable and moveable estate for such five hundred pounds with interest thereon from the date of the death of the intestate at four per cent. per annum until payment.

III. *How charge to be borne between heritable and moveable estate.*—As between the heir-at-law and the representatives of the moveable estate of such intestate, such charge shall be borne and paid in proportion to the net values of the heritable and moveable estate respectively.

IV. *Provisions to be in addition to share of residue.*—The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her rights of terce and jus relictæ in the heritable and moveable estate of such intestate remaining after payment of the sum of five hundred pounds, in the same way as if the residue, after payment of the said five hundred pounds, had been the whole of such intestate's estate, heritable and moveable, and this Act had not passed.

V. *How heritable estate to be valued.* [Repealed 1919.]

VI. *How moveable estate to be valued.*—The net value of the moveable estate as aforesaid shall be ascertained by deducting from the gross value thereof all debts, funeral and testamentary expenses of the intestate, and all other lawful liabilities and charges to which the said moveable estate shall be subject.

* * * * *

INTESTATE HUSBAND'S ESTATE ACT, 1919.

(9 Geo. V. cap. 9.)

I. *Application to court by widow in right of estate under the Intestate Husband's Estate (Scotland) Act, 1911.*—Where a widow is entitled to the whole or part of the estate of her deceased husband, in terms of the Intestate Husband's (Scotland) Act, 1911 (1 & 2 Geo. V. cap. 10) (in this Act referred to as "the principal Act"), she may present in the sheriff court of the county in which her husband was domiciled at the time of his death, or, if the county in which he was so domiciled is uncertain, in the sheriff court of the Lothians and Peebles at Edinburgh, a summary application in the form of the schedule to this Act, or as nearly in such form as the circumstances of the case permit, appending an

inventory giving such particulars of the estate as are indicated in the form of inventory in the said schedule.

II. *Procedure in application to court.*—The sheriff shall order intimation of any application made under the preceding section and of the relative inventory to be given to the heir-at-law of the intestate, if the estate shall partly or wholly consist of heritage, and to the heirs in mobilibus of the intestate if the estate shall partly or wholly consist of moveables; and upon being satisfied after such inquiry as he deems proper that the applicant is entitled under the principal Act to the whole or part of such estate, he shall pronounce decree as hereinafter provided. Provided that, in any case where the heir-at-law or heirs in mobilibus of the intestate is or are unknown and cannot, after such inquiry as the sheriff thinks fit, be ascertained, the sheriff may dispense with intimation accordingly.

III. *Effect of decree of court.*—(1) If the sheriff in any such application determines that the total net value of the estate does not exceed the sum of five hundred pounds, he shall pronounce decree in favour of the applicant, declaring that the estate belongs absolutely and exclusively to her; and on a duly stamped inventory of the estate being lodged by her with the sheriff clerk, or in the case of the application being made in the sheriffdom of the Lothians and Peebles at Edinburgh with the commissary clerk, such decree shall be a sufficient warrant for issuing confirmation of the moveable estate in favour of the applicant as executrix dative qua relict; and on an extract of such decree containing a description of the heritable estate and of the heritable securities and the subjects contained therein, or having a schedule annexed thereto containing the particulars thereof as set forth in the inventory annexed to the initial writ, being recorded in the appropriate register of sasines, the applicant shall be held to be duly infeft in her own right in the heritable estate and heritable securities.

(2) If the sheriff in any such application determines that the net value of the estate exceeds the sum of five hundred pounds, he shall pronounce decree in favour of the applicant against the defender or the defenders jointly and severally as the case may be, for the sum of five hundred pounds part thereof absolutely and exclusively with interest in terms of the principal Act, and the applicant shall have right to recover such sum and interest from the executor dative of the intestate on the expiry of six months from the death of the intestate in so far as there may be any free moveable estate in his hands after payment of the intestate's debts and other proper charges and deductions, but such decree shall

only operate against such defender or defenders to the extent by which he or they shall benefit by the succession, and an extract of such decree duly recorded in the appropriate register of sasines containing a description of the heritable estate, or having a schedule annexed thereto containing the particulars thereof as set forth in the inventory annexed to the initial writ, shall have the full legal force and effect to all intents and purposes of a duly recorded bond and disposition in security over the heritable estate for such sum of five hundred pounds and interest thereon from the date of death of the intestate at four per centum per annum until payment granted by the intestate in favour of the applicant and containing all usual and necessary clauses, including power of sale, and as if the intestate had been subject to no legal incapacity and had been infeft in the heritable estate at the date of his death, and as if the sum therein contained were due at the date of recording the extract decree in the register of sasines: Provided always that the real security so constituted in favour of the applicant shall be postponed to all debts and obligations of the intestate:

Provided further that such decree shall only entitle the applicant to recover from the whole heritable and moveable estate of the intestate the sum of five hundred pounds in all with interest thereon in terms of section two of the principal Act and that such charge shall be borne and paid as between the heir-at-law and the representatives of the moveable estate of such intestate in accordance with section three of the principal Act.

(3) The sheriff to whom any such application is made shall decide for the purpose of jurisdiction any question with regard to the domicile of the intestate, and his decision shall be final and not subject to review.

IV. *Saving*.—Nothing in this Act shall be held to supersede the existing law and practice relating to the delivery and recording of inventories and the lodgment of accounts of the estates of deceased persons and the payment of estate duty thereon, the whole rights of the Crown in regard to death duties remaining unaffected thereby.

V. *Repeal*.—Section five of the principal Act is hereby repealed.

VI. *Construction, citation, and extent*.—(1) This Act shall be read and construed together with the principal Act, and may be cited as the Intestate Husband's Estate (Scotland) Act, 1919; and the principal Act and this Act may be cited together as the Intestate Husband's Estate (Scotland) Acts, 1911 and 1919.

(2) This Act shall apply to Scotland only.

SCHEDULE (Section 1).

FORM OF INITIAL WRIT.

Sheriffdom of _____ *at* _____
A.B., residing at _____, widow of *C.D.* [*design*
him], pursuer, against _____ *E.F.* [*design*
him] and *G.H.* [*design him*] (*or as the case may be*),
defenders.

The pursuer craves the court:—

To find and declare that her said husband died on or about the _____ day of _____, intestate, survived by the pursuer, his widow, but leaving no lawful issue, and that he had at the time of his death his ordinary or principal domicile in the county of _____; [*or that he was domiciled in Scotland, but his place of domicile there is uncertain*]; that the net value of the whole heritable and moveable estate of the said *C.D.*, the particulars whereof are set forth in the inventory appended hereto, does not exceed the sum of five hundred pounds, and that the pursuer is entitled thereto absolutely and exclusively in terms of section one of the Intestate Husband's Estate (Scotland) Act, 1911, [*or in cases where the estate exceeds five hundred pounds in value, substitute the words exceeds the sum of five hundred pounds, and that the pursuer is entitled to five hundred pounds part thereof absolutely and exclusively, in terms of section two of the Intestate Husband's Estate (Scotland) Act, 1911, with interest thereon from (date of death) at four per centum per annum until payment and to grant a decree against the defender (or against the defenders jointly and severally) for payment to the pursuer of five hundred pounds sterling with interest at the before-mentioned rate from the said (date of death) until payment*] and, in the event of the defender (*or defenders or any of them*) opposing this application, to find him (*or them*) liable in expenses.

[*To be signed A.B. pursuer.*
 (or) *X.Y.* [*add designation and business address*]
 pursuer's agent.]

CONDESCENDENCE.

1. The late *C.D.* [*design him*] died on or about the _____ day of _____, and had at the time of his

death his ordinary or principal domicile in the county of
(*as the case may be*).

2. The said *C.D.* died intestate, survived by the pursuer, his widow, but leaving no lawful issue.

3. The net value of his whole estate, the particulars whereof are set forth in the inventory annexed hereto, does not exceed [*or exceeds*] five hundred pounds.

4. The heir-at-law, and the heirs *in mobilibus* of the intestate, so far as known to the pursuer, are [*here give particulars*] who are called as defenders.

Note.—If there be no heritable estate, it is unnecessary to call or state the heir-at-law; if there be no moveable estate, it is unnecessary to call or state the heirs *in mobilibus*.

PLEA-IN-LAW.

The pursuer as widow of the deceased *C.D.* being entitled to the whole estate of her said husband [*or to five hundred pounds part of the estate of her said husband*] is entitled to decree as craved.

In respect whereof,

[*To be signed by pursuer or her agent.*]

INVENTORY OF THE HERITABLE AND MOVEABLE ESTATE REFERRED
TO IN THE FOREGOING INITIAL WRIT.

Heritable Estate.

£ S. D.

Dwelling-house, No.

Street, Portobello, in the county of Edinburgh
[*here describe the subjects at length or by reference in competent form*], valued at - - -

Less principal sum secured by bond and disposition
in security thereon granted by the said *C.D.*, in
favour of *I.J.*, dated and recorded in [*give date
of bond and date of recording and register*] -

Net value - - - - -

[*Add particulars of any other heritable estate*] -

Total heritable estate - - - - -

Note.—If the intestate was not infeft in any part or parts of the heritable estate, deduce his title from the person last infeft at the end of the description of such part or each of such parts respectively.

Moveable Estate.

	£	s.	d.
Cash in the house - - - - -	-	-	-
Household furniture and other effects - - -	-	-	-
Stock-in-trade and other effects - - - -	-	-	-
Sum in bank with interest to date of death, viz. [<i>give particulars</i>] - - - - -	-	-	-
Bond and disposition in security dated and recorded in [<i>give date of bond and date of recording and register</i>], granted by <i>K.L.</i> in favour of the said <i>C.D.</i> , over house, No. _____ Street in the burgh or county of _____ [<i>here describe the subject at length or by reference in competent form</i>], for the sum of - - - - -	-	-	-
[<i>Add particulars of any other moveable estate</i>] -	-	-	-
Total moveable estate - - - - -	-	-	-

Debts and Funeral and Executry Expenses and Death Duties.

	£	s.	d.
Debts due by deceased [<i>give particulars</i>] - - -	-	-	-
Funeral and executry expenses [<i>give particulars</i>] -	-	-	-
Estate duty - - - - -	-	-	-
Total debts, &c. - - - - -	-	-	-

Abstract.

	£	s.	d.
Value of heritable estate - - - - -	-	-	-
Value of moveable estate - - - - -	-	-	-
Total - - - - -	-	-	-
Deduct debts, &c. - - - - -	-	-	-
Net value of estate - - - - -	-	-	-

[*To be signed by pursuer or her agent.*]

INTESTATE MOVEABLE SUCCESSION ACT, 1919.

(9 & 10 Geo. V. cap. 61.)

I. Mother's rights in the succession to an intestate.—
Where any person dies intestate without leaving issue, and
is predeceased by his father, and survived by his mother,

she shall have the same rights of succession to his moveable estate as the father would have had, if he had survived.

II. *Power to Admiralty, War Office, and Air Council to dispose of property in accordance with foregoing section.*—

The provisions of the foregoing section shall not apply to the estate of any person dying before the passing of this Act, provided that the Admiralty, the Secretary of State for War, and the Air Council shall, wherever possible, dispose of any property or funds in their possession at the passing of this Act, belonging or due to any deceased member of His Majesty's Forces, so as to secure that the distribution by the Admiralty, the Secretary of State, or the Air Council, of property or funds of such deceased, whether partly before the passing of this Act or not, shall be in conformity with the law of intestate succession in Scotland as amended by this Act.

III. *Repeal.*—Section four of the Intestate Moveable Succession (Scotland) Act, 1855 (18 & 19 Vict. c. 23), is hereby repealed.

IV. *Interpretation and short title.*—(1) For the purposes of this Act and of the Intestate Moveable Succession (Scotland) Act, 1855, any sum due out of the moveable estate of an intestate to his or her surviving wife or husband, whether at common law or in virtue of any Act of Parliament, shall be deemed not to be part of the free moveable estate on which the intestate might have tested.

(2) This Act may be cited as the Intestate Moveable Succession (Scotland) Act, 1919, and shall be construed as one with the Intestate Moveable Succession (Scotland) Act, 1855.

MARRIED WOMEN'S PROPERTY ACT, 1920.

(10 & 11 Geo. V. cap. 64.)

I. *The right of administration wholly abolished.*—After the passing of this Act the property, heritable or moveable, of a married woman shall not be subject to the right of administration of her husband, and that right is hereby wholly abolished, and a married woman shall, with regard to her estate, have the same powers of disposal as if she were unmarried; and any deed or writing executed by her with reference to her heritable estate in Scotland or to her moveable estate shall be as valid and effectual as if executed by her with consent of her husband according to the present law and practice.

* * * * *

V. *Donations inter virum et uxorem to be irrevocable.*—
Donations inter virum et uxorem shall be irrevocable by the
donors: Provided that—

- (a) this enactment shall not take effect as regards dona-
tions made or granted before the passing of this Act
until the expiry of one year from and after that
date.

* * * * *

CONVEYANCING ACT, 1924.

(14 & 15 Geo. V. cap. 27.)

* * * * *

21. *Terce and courtesy.*—(1) Actions of serving to terce
and kenning to terce are hereby abolished.

(2) A widow claiming and desirous of establishing a right
of terce out of estate which belonged to her deceased husband
may raise an action of declarator in which she shall call
as defenders the heir-at-law of her deceased husband, or
the other persons interested in such estate whose rights therein
may be affected by her claim, and shall specify the items
of the estate out of which she claims terce, and shall crave
the court to grant a decree declaring that she has a right
of terce out of such estate; and on decree of declarator being
pronounced in such action, such widow shall have the same
rights and remedies for recovery of her terce out of such
estate as she would have had on obtaining a decree of ser-
vice to terce according to the present law and practice;
and where any land out of which according to the present law
and practice terce is payable, shall be in the personal occu-
pancy of the proprietor thereof, the widow entitled to such
terce shall in respect of such land have right to, and be en-
titled to recover from such proprietor, such sum as shall
be equal to one-third part of the assessed annual value thereof
appearing in the valuation roll for the time being of the
county or burgh in which such land is situated: Provided
always that on paying such terce to the widow such pro-
prietor shall be entitled to make the same deductions there-
from as he would have been entitled to make if the land
had been let at the assessed rent to a third party, and he
had uplifted the rent and had accounted to the widow for
her share.

(3) (a) A widow having a right of full or lesser terce out
of land, or the proprietor of such land, or any person hold-

ing a security over such land postponed to such right of terce, shall be entitled to bring an action to have it declared by the Court what is the annual amount of such right of terce, and in such action the Court may make such enquiries as in the circumstances shall seem necessary as to the average free rental of such land over such period of years as the Court may think proper, and as to the average annual charges and expenses forming deductions from that rental during that period affecting the widow's terce, and may take into consideration the prospective future annual amount of such rents, profits, charges, and expenses for the presumptive period of the widow's life, and shall fix and determine a sum which one year with another may be taken as the annual amount of the widow's terce out of such land, and on such amount being determined, the same from and after the date of the decree determining the same, or from and after any succeeding term of Whitsunday or Martinmas to be named by the Court, shall be deemed to be the widow's terce, and shall not be affected by any fluctuation of such rent or profits or of the charges or expenses forming deductions therefrom.

(b) On the amount of such right of terce being so fixed and determined, the proprietor of such land, or any person holding a security over such land postponed to the right of the widow, shall be entitled to redeem such right of terce, and may either in the action in which such amount is fixed and determined, or in a subsequent action, pray the Court to declare what is the capital sum to be paid by him in redemption thereof: and for the purpose of determining such redemption price, the Court shall find and declare the same to be the sum required to purchase from a British Insurance Company of good standing to be named by the Court, an annuity on the life of the widow equal in amount to the terce, and similarly payable, or a Post Office Savings Bank Annuity of the like amount, as the Court in its discretion may determine: Provided that where the land has been sold and the Court is satisfied that a fair price has been or is being paid therefor, and if it be the case that the redemption price of the full terce ascertained as aforesaid exceeds one-third of the price obtained for the land, the Court shall limit the redemption price of that terce to one-third of the price of the land.

(c) Any decree granted in terms of paragraph (b) of this subsection shall not prejudice the right of a widow entitled to lesser terce to the increase over the amount of such lesser terce which would accrue to her on the death of the widow of a predecessor in title of her husband: Provided that the proprietor of the land out of which such terce is payable, or any person holding a security over such land postponed

to the rights of the widows, shall be entitled to redeem the prospective right of a widow entitled to lesser terce, and may either in the action brought in terms of paragraph (a) of this subsection, or in a subsequent action, pray the Court to declare what is the capital sum to be paid by him in redemption thereof, and for the purpose of determining such redemption price the Court shall find and declare the same to be the sum required to purchase from a British Insurance Company of good standing to be named by the Court an annuity on the life of the widow entitled to the lesser terce equal in amount to any such increase and similarly payable, and payment of which is postponed until the death of the widow of such predecessor in title, or a Post Office Savings Bank Annuity of the like amount and similarly postponed, as the Court in its discretion may determine.

(d) The proprietor of any land subject to a widower's right of courtesy, or any person holding a security over such land postponed to the right of such widower, shall be entitled to redeem such right of courtesy, and for that purpose shall be entitled to bring an action to have it determined by the Court what is the annual amount of such right of courtesy and what capital sum is to be paid by him in redemption thereof, and in such action the Court may make such enquiries as in the circumstances shall seem necessary as to the average free rental of such land for such period of years as the Court may think proper, and as to the average annual charges and expenses forming deductions from that rental during that period affecting such right of courtesy, and may take into consideration the prospective future annual amount of such rents, profits, charges, and expenses, for the presumptive period of the widower's life, and shall fix and determine a sum which, one year with another, may be taken as the annual amount of such right of courtesy, and on such amount being determined shall find and declare the redemption price to be the sum required to purchase from a British Insurance Company of good standing to be named by the Court an annuity on the life of the widower equal in amount to the annual amount of his right of courtesy and similarly payable, or a Post Office Savings Bank Annuity of the like amount, as the Court in its discretion may determine.

(e) On consignation in the hands of the Clerk of Court, on or before a date to be fixed by the Court, of the redemption price of any right of terce, present or prospective, ascertained in terms of paragraphs (b) and (c) of this subsection (limited if necessary as in paragraph (b) as regards the redemption price of the terce) or of any right of courtesy

ascertained in terms of paragraph (d) of this subsection, the Court may declare the land to be free and disburdened of such right of terce or courtesy, as the case may be, and on such decree being pronounced the land shall thereafter be possessed, freed and disburdened of such right of terce or courtesy accordingly, and the widow shall, in respect of such right of terce, or the widower shall, in respect of such right of courtesy, cease to have any right or interest in such land or in the rents thereof, but shall have right to the consigned price: Provided always that such decree in the case of a widow shall not prejudice her claim to any arrears of terce due at the date thereof, or to a due proportion of terce for the period from the term or date when the last payment was due, or from the date of the death of her husband, as the case may be, to the date of such consignment, and in the case of a widower shall not prejudice his claim to any rents due to him at, or prior to, the date of such consignment.

(f) For the purposes of paragraphs (a), (b), (c) and (d) of this subsection, a person holding a security over such land shall mean a person who has entered into possession of such land in virtue of his security over the same, or a person who has given statutory notice to the proprietor of the land requiring payment of the debt for which he holds the land in security, which notice has expired without payment of the debt having been made.

(g) In any action raised in virtue of paragraphs (a), (b), (c) and (d) of this subsection the Court may find and declare that there are no free annual rents or profits of the land subject to any right of terce or courtesy, and may declare the land to be free and disburdened of such right of terce or courtesy as the case may be, and on such decree being pronounced the land shall thereafter be possessed, freed and disburdened of such right of terce or courtesy accordingly.

(4) (a) The right to courtesy of any widower whose wife has died after the commencement of this Act, and the right to terce of any widow whose husband has died after the commencement of this Act, shall not be measured by the infetment of such wife or husband, or depend on the completion of the title of such wife or husband by the recording thereof in the appropriate Register of Sasines, but the widower's right to courtesy shall extend to all estate to which his deceased wife had a personal title capable of being completed by infetment, or by being recorded in the appropriate Register of Sasines (including heritable estate to which her title might be completed as aforesaid held in trust for

her behoof), and out of which, if her title had been so completed, he would have had a right of courtesy; and the widow's right of terce shall extend to all estate to which her deceased husband had a personal title capable of being completed by infeftment or by being recorded in the appropriate Register of Sasines (including heritable estate to which his title might be completed as aforesaid held in trust for his behoof), and out of which, if his title had been so completed, she would have had a right of terce.

(b) No widower whose wife, and no widow whose husband, has died after the commencement of this Act shall be entitled, in the case of a widower, to courtesy, and in the case of a widow, to terce, out of land which has been absolutely disposed, or out of any security over land which has been absolutely assigned, in the case of a widower, by his wife, and in the case of a widow, by her husband, for an onerous consideration, although the title of the disponee or assignee shall not have been completed by infeftment or by recording of the same in the appropriate Register of Sasines prior to the death of such wife or husband; and the right of any such widower to courtesy, and of such widow to terce, out of any land disposed by such wife or husband in security, shall be postponed to the right of the creditor in whose favour such security shall have been granted, although the title of such creditor shall not have been completed by infeftment or by recording of the same in the appropriate Register of Sasines prior to the death of such wife or husband.

(c) No widow whose husband has died after the commencement of this Act shall be entitled to claim terce in competition with a creditor of her deceased husband, and no widower whose wife has died after the commencement of this Act shall be entitled to claim courtesy in competition with a creditor of his deceased wife.

(5) For the purposes of this section, "widow" shall include a woman who has obtained a decree of divorce against her husband and "widower" shall include a man who has obtained a decree of divorce against his wife.

(6) The charges and expenses which are to form deductions from the rental in ascertaining terce or courtesy in terms of this section shall include any feu-duty, ground annual, teind, stipend, or land tax, interest on all heritable debts due by the deceased or affecting his or her heritable estate, interest on all moveable debts due by the deceased which his or her moveable estate is insufficient to meet, interest at such rate as the Court may think proper on any capital sums which have been applied by the heir or other representative of the deceased in the payment of any debts

affecting or which but for such payment would have affected the heritable estate, or in redeeming casualties in terms of the Feudal Casualties (Scotland) Act, 1914, rates, taxes and assessments payable in respect of the deceased's heritable estate, and all other burdens on and payments falling to be made out of the rents and other income of the deceased's heritable estate, and in all cases where necessary such reasonable allowance as the Court in its discretion may fix for repairs, for insurance against loss by fire and other risks, and for factorage and management, and also for loss of rents through the land, or part of it, being unlet, or through defaulting tenants.

(7) If in any action raised under the provisions of this section for determining terce or courtesy it shall appear that there is more than one subject out of which terce or courtesy is claimed, the Court, if a defender of such action shall so require, shall determine what is the amount of terce or courtesy payable out of each subject.

(8) Any action or proceedings under this section may be raised—

(a) in the Court of Session, or alternatively;

(b) where the land to which such action or proceedings relate is situated wholly within one county, or partly in one county and partly in a county or counties contiguous thereto, then in the sheriff court of the county in which the whole or the greater part of such land is situated.

(9) An extract of any decree pronounced in terms of this section may be recorded in the appropriate Register of Sasines.

22. *Assimilation of law as regards legitim and jus relictæ, &c.*—(1) In the case of any person dying after the commencement of this Act, the rules of law which determine what estate belonging to a deceased is subject to claims for legitim shall be applicable in determining what estate belonging to the deceased is subject to the claim for jus relictæ or jus relictî: And the estates of all such persons shall be distributed on the footing that there shall no longer be any distinction between the description of estate subject to claims for legitim and the description of estate subject to claims for jus relictæ and jus relictî.

(2) All debts which if due to any person dying after the commencement of this Act would, according to the present law and practice or in terms of this section, be subject to legitim and jus relictæ or jus relictî shall, if due by the

deceased or out of his or her estate, form, so far as the estate on which such debts are secured may be insufficient to meet the same, deductions from the deceased's moveable estate before ascertaining legitim and jus relictæ or jus relictî.

* * * * *

ENGLAND.

ADMINISTRATION OF ESTATES ACT, 1925.

(15 Geo. V. cap. 23.)

* * * * *

46. *Succession to Real and Personal Estate on Intestacy.*—

(1) The residuary estate of an intestate shall be distributed in the manner or be held on the trusts mentioned in this section, namely:—

- (i) If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate of the intestate (other than the personal chattels) shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent. per annum until paid or appropriated, and, subject to providing for that sum and the interest thereon, the residuary estate (other than the personal chattels) shall be held—

(a) If the intestate leaves no issue, upon trust for the surviving husband or wife during his or her life;

(b) If the intestate leaves issue, upon trust, as to one half, for the surviving husband or wife during his or her life, and, subject to such life interest, on the statutory trusts for the issue of the intestate; and, as to the other half, on the statutory trusts for the issue of the intestate, but if those trusts fail or determine in the lifetime of a surviving husband or wife of the intestate, then upon trust for the surviving husband or wife during the residue of his or her life:

- (ii) If the intestate leaves issue but no husband or wife, the residuary estate of the intestate shall be held on the statutory trusts for the issue of the intestate;
- (iii) If the intestate leaves no issue but both parents, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the father and mother in equal shares absolutely;
- (iv) If the intestate leaves no issue but one parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the surviving father or mother absolutely;
- (v) If the intestate leaves no issue or parent, then, subject to the interests of a surviving husband or wife, the residuary estate of the intestate shall be held in trust for the following persons living at the death of the intestate, and in the following order and manner, namely :—

First, on the statutory trusts for the brothers and sisters of the whole blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Secondly, on the statutory trusts for the brothers and sisters of the half-blood of the intestate; but if no person takes an absolutely vested interest under such trusts; then

Thirdly, for the grandparents of the intestate and, if more than one survive the intestate, in equal shares; but if there is no member of this class; then

Fourthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the whole blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Fifthly, on the statutory trusts for the uncles and aunts of the intestate (being brothers or sisters of the half-blood of a parent of the intestate); but if no person takes an absolutely vested interest under such trusts; then

Sixthly, for the surviving husband or wife of the intestate absolutely;

- (vi) In default of any person taking an absolute interest under the foregoing provisions, the residuary estate of the intestate shall belong to the Crown or to the Duchy of Lancaster or to the Duke of Cornwall for the time being, as the case may be, as *bona vacantia*, and in lieu of any right to escheat.

* * * * *

47. *Statutory Trusts in Favour of Issue and Other Classes of Relatives of Intestate.*—(1) Where under this Part of this Act the residuary estate of an intestate, or any part thereof, is directed to be held on the statutory trusts for the issue of the intestate, the same shall be held upon the following trusts, namely:—

- (i) In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, who attain the age of twenty-one years or marry under that age, and for all or any of the issue living at the death of the intestate who attain the age of twenty-one years or marry under that age of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking;
- (ii) The statutory power of advancement, and the statutory provisions which relate to maintenance and accumulation of surplus income, shall apply, but when an infant marries such infant shall be entitled to give valid receipts for the income of the infant's share or interest;
- (iii) Where the property held on the statutory trusts for issue is divisible into shares, then any money or property which, by way of advancement or on the marriage of a child of the intestate, has been paid to such child by the intestate or settled by the intestate for the benefit of such child (including any life or less interest and including property covenanted to be paid or settled) shall, subject to any contrary intention expressed or appearing from the circumstances of the case, be taken as being so paid or settled in or towards

satisfaction of the share of such child or the share which such child would have taken if living at the death of the intestate, and shall be brought into account, at a valuation (the value to be reckoned as at the death of the intestate), in accordance with the requirements of the personal representatives;

- (iv) The personal representatives may permit any infant contingently interested to have the use and enjoyment of any personal chattels in such manner and subject to such conditions (if any) as the personal representatives may consider reasonable, and without being liable to account for any consequential loss.

(2) If the trusts in favour of the issue of the intestate fail by reason of no child or other issue attaining an absolutely vested interest—

- (a) the residuary estate of the intestate and the income thereof and all statutory accumulations, if any, of the income thereof, or so much thereof as may not have been paid or applied under any power affecting the same, shall go, devolve and be held under the provisions of this Part of this Act as if the intestate had died without leaving issue living at the death of the intestate;
- (b) references in this Part of this Act to the intestate “leaving no issue” shall be construed as “leaving no issue who attain an absolutely vested interest”;
- (c) references in this Part of this Act to the intestate “leaving issue” or “leaving a child or other issue” shall be construed as “leaving issue who attain an absolutely vested interest.”

(3) Where under this Part of this Act the residuary estate of an intestate or any part thereof is directed to be held on the statutory trusts for any class of relatives of the intestate, other than issue of the intestate, the same shall be held on trusts corresponding to the statutory trusts for the issue of the intestate (other than the provision for bringing any money or property into account) as if such trusts (other than as aforesaid) were repeated with the substitution of references to the members or member of that class for references to the children or child of the intestate.

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